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ABSTRACT

The movement of the disabled and disadvantaged from charity to rights is described, and laws defining and applying to these individuals are reviewed. Specific attention is given to the socially and economically disadvantaged, including minority ethnic groups, the offender, and the poor, and to the mentally and physically disabled, including the mentally retarded, the mentally ill, alcoholics and drug addicts, the physically handicapped, and the aged. Legal rights of all the disabled and disadvantaged are surveyed and general principles, specific needs, and suggestions for implementation are presented. (JD)

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Legal Rights of the Disabled and Disadvantaged

by

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"Legal Rights of the Disabled and Disadvantaged" is one of a series of five papers prepared for the use of delegates to the National Citizens Conference on the Disabled and Disadvantaged which was held in Washington, D.C., June 24–27, 1969. Other papers in the series are: "Financing Rehabilitation Services", "Delivering Rehabilitation Services", "Consumer Involvement in Rehabilitation", and "The Goal is Mobility" (dealing with the architectural barriers problem). "People Power" (a report of the Conference) has also been published.

All five Conference papers were written under contract with the Social and Rehabilitation Service of the U.S. Department of Health, Education, and Welfare. The opinions expressed are those of the authors and/or members of the Conference work groups who requested the papers and aided in their preparation. The views do not necessarily reflect opinions or policies subscribed to by the Department of Health, Education, and Welfare.

Members of the Conference Work Group on Consumer Involvement in Rehabilitation requested the paper on legal rights and gave advice and suggestions to its author. Members of this group and the agencies they represented were:

Chairman: Donald L. Parks, Addicts Rehabilitation Center
Vice-Chairman: John Nagle, National Federation of the Blind
James Allen, Addicts Rehabilitation Center
Miss Linda Asay, Council of State Governments
Terrence Carroll, National Institutes on Rehabilitation and Health Services
Miss Lenora Chavez, League of United Latin American Citizens
Patrick Healy, National League of Cities
Bernard Hillenbrand, National Association of Counties
Durward Mc Daniel, American Council of the Blind
Levitte Mendel, National Health Council
Mrs. Sarah Newman, National Consumers League
Lawrence Smedley, American Federation of Labor and Congress of Industrial Organizations
Harry W. Swegle, American Bar Association
Mrs. Dolores Tomlin, Watts Community Coordinating Council

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Introduction—from Charity to Rights

> Defend the poor and fatherless: do justice to the afflicted and needy. (Psalms 82:3)

The Psalmist's injunction to " . . . do justice to the afflicted and needy" is what this paper—what this Conference—is all about. Both proceed on the assumption that the "afflicted and needy"—the disabled and disadvantaged—are not as dissimilar as their external appearances might suggest. They share a host of deprivations: of education, of job opportunities, of social participation, and of basic rights of citizenship. They have a common need for rehabilitation services if the debilitating effects of their handicaps are to be overcome or ameliorated. And they have a common right to full enjoyment of that fundamental concept of our jurisprudence: *Equal Justice under Law*; they who have for so long had precious little of either equality or justice.

The National Citizens Advisory Committee on Vocational Rehabilitation in calling for a national citizens conference on rehabilitation of the handicapped, observed that:

> The American public is not sufficiently aware of the plight of its handicapped citizens nor of what rehabilitation programs can accomplish for them.

A start has been made toward bringing to bear upon the problems of the "hard-core" unemployed the skills and broadly-based services that the Social and Rehabilitation Service has applied so successfully with the mentally and physically handicapped, under the 1968 Amendments to the Vocational Rehabilitation Act (PL 90–391, 82 Stat. 297). But it is only a start: the authorization of $50 million for the first fiscal year of the program—and not a cent of the allowed amount was actually appropriated—is only a little more than half the daily cost of the war in Viet Nam. The total authorization of $225 million through fiscal 1971, if the full amount were in fact appropriated and divided equally among the residents of that "Other America" so eloquently described by Michael Harrington (1962), would provide each with less than the price of a pair of shoes. Yet the problems of the disadvantaged have a quality of urgency that caused John Gardner to declare, in one of his last statements as Secretary of Health, Education, and Welfare:

> I cannot speak with assurance, only with concern . . .
> (for) the alarming character of our domestic crisis . . .
> We are in deep trouble as a people.

Professor Reich of the Yale Law School has observed (1965) that: "The law of social welfare grew up on the theory that welfare is a 'gratuity' furnished by the state, and thus may be made subject to whatever conditions the state sees fit to impose." The mentally and physically disabled, and those disadvantaged by ethnic prejudice and by social and economic estrangement have suffered depredations in the name of "charity" that would shock the national conscience if imposed as punishment.

A Catalog of Horrors

The catalog of horrors is almost endless: the deaf child institutionalized in a human storage bin called a "State Training School" because inadequate admission and review procedures failed to discover his misdiagnosis as "retarded;" the 80-year-old inmate of a "home"—homelike only in name—whose physical decline has made him bed-ridden and impaired his bladder control, compelled to lie for hours in his own excrement until an attendant can find time to attend to him; the unemployed head of a family, for whom the "price" of the meager benefits with which he somehow keeps his family alive is loss of human dignity through something called "investigation of eligibility," which begins with the assumption that he is irresponsible and dishonest; the young woman whose price for release from a state hospital is her "voluntary" agreement to sterilization; the mother deserted by her husband, who is denied aid for her dependent child because her relationship with a man to whom she is not married has offended the ineluctable morality of welfare regulation; the profoundly retarded adult, spreadeagled to a crib in a ward in which practices are permitted for "administrative convenience" which could never exist in the city's zoo just down the road; the . . .

But it has all been said before: over and over again. Deutsch said it about the treatment of the mentally ill (1949; Congressional Hearings, 1961). The late Senator Kennedy said it after visiting institutions for the mentally retarded in New York and so did the team of physicians who saw starvation in Appalachia and in rural America (Hunger U.S.A., 1968), and the Kerner Commission spoke with eloquence about the degredation of the urban ghetto (1968).

Who Is Guilty?

Among the impediments to change is the fact that the real villains of the piece are not the blatantly wicked and malicious, but rather: the bureaucrat preoccupied with forms to be completed; the ward attendant without enough training—or help—to treat patients as people; the legislator making a record for the folks back home by grappling with the chimera of "welfare chiselers;" the unconscious racist—some of whose "best friends are Negroes;" the Judge who hasn't troubled to find out that there are resources in the community that might serve in lieu of institutionalization; and the institutional superintendent who—for administrative convenience—deals with all his patients as though they had been declared legally incompetent; and all the rest of us—the non-disabled and advantaged, too busy living our own lives to notice. And one must include as well a myriad of laws and administrative regulations, many of which were adopted with undoubtedly humanitarian motives, but whose effect is to denigrate the citizenship—indeed the humanity—of the disabled and disadvantaged: charitably to deprive them of the very thing which is most precious to any human being, and most essential to his fulfillment.

The author had the great pleasure and privilege of presenting a paper at the Fourth Congress of the International League of Societies for the Mentally Handicapped, held in Jerusalem last October. The theme of that meeting: *From Charity to Rights,* would have been appropriate for this Conference as well, for the greatest barrier to rehabilitation of the handicapped is often not the handicap itself, so much as the status of non-person to which being handicapped may relegate one. In the author's opinion, the conceptual transition "from charity to rights" is a precondition of an effective rehabilitation program. And it is with that admitted bias that this paper is written.

The Limitations of Law

From what has been said, it may also be concluded that enacting a "model law" will not solve the problem of abridgements of right. The following may serve as further validation of the aphorism of Spinoza, that "He who tries to fix and determine everything by law will inflame rather than correct the vices of the world."

The Institute of Law, Psychiatry and Criminology of The George Washington University for the last half-dozen years, with the support of the National Institute of Mental Health, has been conducting empirical studies of legal determinations of incompetency and the need for a guardian or conservator, and of the operation of both civil and criminal laws and regulations affecting the mentally retarded and their families.

Early in our study of "competency" determinations, we made an analysis of the statutes under which adjudications are made and we found a marked contrast between two of our study jurisdictions. In the District of Columbia, the law has few due process protections: for example, it does not require that the alleged incompetent for whom a conservator is sought be represented in the proceedings, or that medical testimony—or even a medical certificate—be presented. In Texas, there is a statute requiring appointment in *every* case of an attorney ad litem, and requiring also the sworn testimony of at least two physicians who have examined the alleged incompetent within fifteen days of the hearing; other provisions guarantee the right of the subject of the inquiry (who, under the Texas procedure has already been hospitalized) to be present, to demand a jury trial, present evidence, cross-examine witnesses, etc.

But what *really* happens in these two jurisdictions is quite different from what one might expect from comparing the two statutes. In the District of Columbia, we found that the United States District Court judges always appointed an attorney to represent the alleged incompetent, usually from among younger members of the bar who had represented indigent defendants in criminal cases. We found further that these attorneys took their work seriously, and almost always had conducted a sufficient investigation before the hearing to be able to substantiate or refute the allegations of the petition. We found quite a different situation in Texas as indicated by the following excerpts from an observation recorded by one of our field investigators in a Texas court:

> The hearings I attended were conducted in a lecture room at the _____ Hospital. Seated on a small stage at a long table were _____, the attorney ad litem, Judge _____ and the chief clerk.
>
> I asked [the attorney ad litem] if he had contacted any of the proposed patients. He had not. He had received letters from two of the persons involved, but apparently had done nothing with them except read them. I read one and it was from a female patient who was complaining about the pending proceedings—"I am not mentally ill and I want to go home." Questions were raised that a privately retained attorney would feel required an answer.
>
> Incredible as it may seem, forty cases were to be heard that afternoon. All these proposed patients had "waived" a jury trial.
>
> The hearings followed a monotonous regularity to their inevitable conclusion. *All* of the proposed patients were ordered indefinitely committed and *all* were found to be incompetent. The hearings began at 2:00 p.m. and ended at 3:05 p.m.—an hour and five minutes for 40 cases; about a minute and a half per patient!
>
> All the doctors were sworn by Judge_____ prior to testifying. As each case was called, the doctor would give the height, weight, and color of hair and eyes of the patient. This is for the form sent to the Department of Public Safety for action concerning drivers licenses. Next, the judge would read the patient's name and state the dates of medical examination. Without pausing or looking up he would then read to the doctors, apparently from the Order of Commitment: "Is it your opinion and both of you agree that _____ is a mentally ill person and needs medical care and treatment for his own welfare and protection or protection of others and is mentally incompetent?" The doctors would answer "Yes" and the next case would be called in like fashion. One doctor was reading his *New York Times,* while making his responses.
>
> Only two of the patients actually appeared at the hearing. One was the woman who wrote the attorney ad litem prior to the hearing . . . She stated [to the Judge] that she was not mentally incompetent. One of the doctors who "testified" stated that he had not really examined her, but had spoken to her for a few minutes in anticipation of the hearing, since her regular doctor was on vacation . . . The attorney whispered to the woman that since she

would be going home in a few weeks there was no need to worry. She stated that as long as she was home by January 15, "that would be fine" . . . Everyone breathed a little sigh of relief when she left. Apparently some schedules were in jeopardy with this "upstart" who consumed four or five minutes, the longest single case. (Allen, Ferster and Weihofen, 1967).

There has been great temptation in the writing of this paper, to try to address every human need, grapple with every human injustice, and label it all: "Man's Inhumanity to Man." But limitations of time, space and human capacity make that impossible. Some parsimony has had to be practiced. Not every disability and disadvantage is specifically treated in the pages to follow. Indeed, some (e.g., heart disease, stroke, and speech defects) are barely touched upon; not because they are not important, or do not fall appropriately within the ambit of concern of a national conference on rehabilitation of the handicapped, but rather because the focus of emphasis herein is upon the legal rights of the disabled and disadvantaged rather than upon the handicapping conditions *per se*. For his eclecticism, the author accepts full responsibility.

The Timing of Services

Rehabilitation services, broadly defined, may be employed at various points in time, to attain a number of different objectives. These may include: *prevention* (e.g., insuring proper prenatal care, providing dietary supplements, immunizations, etc.); *correction* (efforts directed at cure or remission of symptoms, academic and vocational training); *adaptation* (which embraces both adapting the handicapped to the world, and the world to the handicapped: e.g., training the blind to do skilled work despite their lack of vision and educating industry to hire the blind for work they are capable of doing); *protection* (including everything from family casework, or the provision of housekeeping services, at one end of the spectrum to guardianship and institutionalization at the other); and *integration* (of those whose full participation in society is prevented or hindered by actual or perceived conventions of exclusion: the ex-offender, the addict, the member of an ethnic minority). And each of these bases of intervention may have important legal—as well as medical, social, psychological, educational, and vocational—aspects.

There are, of course, significant differences in the strategies which may appropriately be employed in dealing with the various handicaps. For example, the retardate may not be "curable" in the same sense as one who is mentally ill, but may be quite capable of living and providing for himself in the community if given proper training and minimal protective services. And there are also differences in the ways in which legal parameters must be structured: the legal (if not the moral) significance of job discrimination is quite different when it is based upon the color of the applicant's skin than when it is based upon his prior criminal record; and while consumer participation in policy decision-making may be possible—and even desirable—for the mentally retarded, it would be, one would suppose, quite a different thing from such participation by recipients of services for the deaf.

Common Legal Needs

Yet, there are a number of common legal threads. As was observed earlier, many of the grosser intrusions into the handicapped person's privacy, human dignity, even his exercise of jural rights, are less a response to a particular handicap than to the status of being a handicapped person or a recipient of welfare. In the author's opinion, there should be a unifying legal principle in the context of which the legal rights of all handicapped persons should be determined: the principle of *normalization.*

Normalization is not a new concept—though its application to legal status is just beginning to be urged. Simply expressed, it is to let the handicapped person obtain an existence as close to the normal as is possible (Nirje, 1967). The principle has relevance to the rendition of every rehabilitation service: and, it is submitted, to "legal rights" as well.

In 1967, the International League of Societies for the Mentally Handicapped convened in Stockholm a symposium of experts from all over the world to consider legislative reform in behalf of the retarded. In the document produced by that distinguished body (Sterner, 1967), the following was stated as the first "General Principle:"

> The mentally retarded person has the same rights as other citizens of the same country, same age, family status, working status, etc., unless a specific determination has been made, by appropriate procedures, that his exercise of some or all of such rights will place his own interests or those of others in undue jeopardy.

This is an application of the principle of normalization; and it is the converse of the widely-held view (even among lawyers and judges) that once labeled "deficient" the retarded person may appropriately be presumed incapable of exercising any of the rights of citizenship.

The normalization principle applied to law might also be construed to require—as of right—that society provide such care, treatment, assistance, education, protection and restriction as is necessary and appropriate to ameliorate, or overcome, the effects of the handicap. Such an extension of the concept would require a far greater national effort to combat the problems of poverty and disability than has yet been made. It would also seem consistent with the language of that great document whose 200th anniversary we will soon celebrate:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That, to secure these rights, Governments are instituted among Men . . .

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Who are the Disabled and Disadvantaged?

The Mentally and Physically Disabled

The Mentally Retarded

> It is most certain that our Law hath a very great and tender consideration for Persons naturally Disabled . . . The Law protects their Persons, preserves their rights and Estates, Excuseth their Laches, and assists them in their Pleadings . . . They are under the Special Aid and Protection of his Equity, who is no less than Keeper of the King's conscience. (1712)

Nearly 5½ million American citizens "are significantly impaired in their ability to learn and adapt to the demands of society," according to a report rendered in 1962 by the President's Panel on Mental Retardation. Today the figure is closer to 6 million. While less than 10 percent of this group are so severely limited in their intellectual development as to require constant care or supervision, all of them may be affected in one way or another by the laws and administrative practices in a number of areas of human activity and societal concern. Of especial significance in this regard are the legal provisions and practices pertaining to: institutionalization of the retarded; their legal status and treatment in residential care institutions; involuntary sterilization; the problem of the retarded delinquent; guardianship and incompetency; and the retarded offender.

A century or less ago, when most people, even many in the learned professions, looked upon the retarded as hopelessly incapable, often dangerous, almost sub-human creatures, they were not often thought of as having legally enforceable rights. Indeed, when the term "rights" was used in relation to the mentally retarded, the reference was usually to the prerogative accorded to relatives and creditors to obtain appointment of a guardian or conservator to prevent waste or destruction of any property that might come into the possession of the retardate; or the "right" of society to protect itself against the retardate's derelictions and unwanted offspring, by confining and sterilizing him—generally on no more proof than the fact of his intellectual impairment. Today we know that the mentally retarded are far from "hopeless", need be neither dangerous nor promiscuous, can be good citizens and even good parents; and that in most cases they can be trained to become self-sustaining, contributors to society rather than burdens upon it.

The quotation with which this section was begun, was used by the Task Force on Law of the President's Panel on Mental Retardation to introduce its Report (1963). The thought expressed is a noble one, but the hard fact is that in the two and a half centuries since it was set down, perhaps the most creative epoch of our common law, the mentally retarded have received little protection of their persons, their rights or their estates. Equal justice under law—the birthright of all American citizens—has not been extended to the inherently unequal.

Varied Definitions

A facet of the problem which often is—but should not be—ignored, is the matter of semantics. California statutes, for example, contain over half a hundred different descriptive terms apparently intended to include or exclude the retarded for everything from eligibility for a driver's license to involuntary institutionalization. But it is not alone the technical words, the "terms of art," that present problems. In our researches we found institutions where the verbal facade of "occupational therapy" and "seclusion" masked the reality of menial housekeeping tasks, performed for the benefit of the institution, and punitive jailing. And in one State, where the statutes require appointment of counsel in a commitment proceeding if requested by the alleged retardate, his parent or guardian, we found that any such request is met with the response: "But this is a *medical* hearing, and all we are concerned with is the child's *welfare.*" The request is usually withdrawn.

We found in examining statutes and regulations governing admission to residential care institutions (Newman, 1967), that in half the States "inability to manage oneself or one's affairs" is the critical determination; yet that criterion, relevant to a proceeding to determine civil competency and the need for a guardian, is not apposite to a determination of the needs for residential care. When applied to children it is patently ridiculous, for "inability to manage oneself or one's affairs" is as characteristic of the normal as of the retarded child of tender years. We found further, that because of the variety (and often inappropriateness) of the terms used ("mentally weak", "defective", incompetent", etc.) for one found eligible for residential care, a process of reification takes place, under which, when one is found to be in need of a given protective service, the resulting labeling often produces a de facto incompetency for *all* purposes. The reification process also takes place within institutions, for example a child denominated "trainable" is thereby denied exposure to "educational" programs from which he might well benefit.

Before leaving the subject of semantics, mention should be made of the ubiquitous I.Q. score as a method of institutional, legal social and educational classification. Whatever differences of opinion may exist among educators, psychologists, physicians, welfare workers and institutional superintendents with respect to mental retardation, on two points, at least, there seems to be unanimity: first, that an I.Q. score standing alone says very little and should never be the sole basis for making critical decisions about a person; and second, that because of the imprecision of definitions and ambiguity of terminology, I.Q. scores are the only practicable common language. Unfortunately, legal status is too often determined on the basis of a single I.Q. scoring despite the reservations expressed by all who participate in the classification process.

Institutional Care

a. *Institutionalization of Young Children*: First admissions to residential care institutions for the mentally retarded are predominately of children. Therefore, as a part of our study of the mentally retarded and the law, the Institute of Law, Psychiatry and Criminology interviewed obstetricians, pediatricians, psychiatrists and institutional superintendents in seven states to determine their attitudes concerning institutionalization of young children. Comparing the results with those of earlier studies, we concluded that there is a growing trend favoring home care of every young child whenever possible. However, many—including most of the obstetricians interviewed (who have perhaps least contact with retarded children, but whose opinion may weigh most heavily with parents at that traumatic time of first discovery of an apparent impairment)—still urge institutionalization of retarded children under 6, even in the face of parental objection (especially in the case of the mongoloid child, whom they view with despairing negativism). In fact, a majority of obstetricians said they would recommend institutionalization of *all* infants recognized as retarded where there are other children in the home. Only 17 percent of the pediatricians and psychiatrists and none of the institutional physicians would agree.

Our laws seem to operate on the premise that institutionalization is for the benefit of the child; indeed many urge that institutionalization on parental application should be made as easy as possible. Yet, it would seem that a great many children are institutionalized less for their own benefit than for the comfort of others. Because it is believed that the retarded—including retarded children—do indeed have "rights", the author would be inclined to differ with the Task Force on Law of the President's Panel on Mental Retardation, and require judicial approval in any case in which institutionalization is based not on the needs of the child but on the needs of others, in order that appropriate resolution may be made of the perhaps conflicting interests of the child and his family, and that use of alternatives to residential care may be explored.

b. *Admission Procedures*: Where judicial procedures are required for admission to a residential care institution, our researches disclosed that in most courts a petition for commitment is invariably approved. Rarely does a court inquire into the possibility of utilizing community resources instead of institutionalization. Indeed, rarely is the judge even aware of them.

In only one of the jurisdictions in which empirical research was undertaken did the proceedings appear to be an inquiry into the merits of the case. In one of the two courts observed, three of 40 petitions were disapproved, and in the second (which requires testing of the alleged retardate by its own clinicians), 10 of 41 petitions were disapproved. Of the cases dismissed, four of the children were found not sufficiently retarded to require institutionalization, and nine were found not mentally retarded (one, for example, was found intellectually normal, but deaf).

Our studies disclosed hundreds of "displaced persons"—retarded children and adults in mental hospitals, and children with a primary diagnosis of mental illness in schools for the retarded. Admission of the retarded to State mental hospitals is sometimes the result of ignorance or mistaken diagnosis, but more often is knowingly permitted because of the crowded condition of State training schools. Some training schools blame the courts for improperly committing mentally ill children to their facilities, but others admit accepting mentally ill children because the State hospital has no facilities for children and they "have no place else to go." Both groups of children suffer as the result of their "displacement".

It has long been known that institutionalization and legal incompetency are quite different, though related, concepts. Thus, a determination that a mentally retarded person is in need of institutional care should not automatically deprive him of his civil rights. Yet in two of the States in which we conducted studies, although the law expressly declares that institutional commitment does not of itself constitute a finding of legal incompetency, other statutes and hospital regulations prohibit *all* residents of institutions for the retarded from holding a driver's license, making a will, marrying, executing a contract (even one involving a small purchase or a magazine subscription), and from having any right of management of property (Allen, Ferster and Weihofen, 1968).

c. *Legal Status and "Treatment"*: In every State there is a need for many more community facilities to serve as alternatives to residential care: day care centers, sheltered workshops, recreational programs, family casework, job placement, private boarding facilities, developmental centers and the like. There is also a need for more funds and more trained personnel in residential care institutions. At one institution, for example, with a patient population of over 3500, only four patients have been placed in day work in the community; and at another, with a high proportion of educable patients, there is no educational program at all. In several States little or nothing has been done to develop vocational training, and work assignments are based more on institutional needs than on habilitation of the patients.

The opening sentence in the recently published compendium of policy statements on residential care approved by the Board of Directors of the National Association for Retarded Children is this indictment of State residential institutions for the retarded:

> The failure to eliminate dehumanization in State institutions throughout the United States is testimony that the work of the National Association for Retarded Children is far from finished. (N.A.R.C., 1968)

The Task Force on Law of the President's Panel on Mental Retardation urged that ". . . every means should be sought to minimize the need for physical restraint and to scrutinize its use." Most institutions, we found, employ "seclusion" and other restraints as means of protecting patients or controlling their behavior. In most institutions they are applied humanely and in the interest of the patient. In some, however, discretion to employ them is given to untrained ward attendants, and that discretion is often exercised less for the patient's well-being than for the comfort of the staff. In one institution, seclusion was regularly applied for much longer periods than permitted by hospital regulations, and under conditions which would not be permitted in the most repressive penal institution. In another, ward attendants had obtained prescriptions for tranquilizing drugs at one time or another for many of the patients in their wards. Once obtained, these prescriptions were refilled and administered by attendants with no medical control whatever.

Subtler, but perhaps of even more insidious effect, are the intrusions into a patient's dignity as a human being that occur, not through malice, but for "administrative convenience." The N.A.R.C. policy statement notes that:

> Lack of privacy, lack of personal possessions, lack of involvement in decisions affecting oneself, lack of praise for a job well done, lack of feeling that someone cares, lack of being recognized as an individual with ability and potential for growth, enforced and unnecessary regimentation, being ignored, living in crowded unattractive wards—these are but a few of the many kinds of conditions which can and do exist in residential facilities and which contribute greately to dehumanization. (1968)

Nor are the effects of such dehumanizing treatment of relevance only with respect to the "educables" and "trainables". Our field investigators observed wards for the profoundly retarded containing "crib cases": children whom the attendants explained to them "don't walk much." The field researchers, unsophisticated in institutional methods, noted also in their reports that in many instances there was nothing to walk *to*—no toys, no playroom; nothing to entice a child from the world of his crib. In one instance, a "non-ambulatory" child was taken from such a ward and given special care in a program conducted by a child psychologist and supported by a small research grant. With weeks of effort and skilled attention the child did learn to walk. Then, when the grant ran out, she had to be returned to the ward, where she is now living—as a "crib case".

Laboring under severe shortages of money and trained personnel, institutional officials express uncertainty as to the objectives their institutions can or should try to meet. Should emphasis be placed upon teaching the educable retardate? upon inculcating personal and work skills among the trainables? providing short-term care during family emergencies or vacation periods for retardates who live at home? providing custodial care for the severely and profoundly retarded? offering day-care, vocational-placement and other services? each of the foregoing? Many institutional personnel expressed to us the view that the residential care facility had become a "dumping ground", enjoined vaguely to accomplish all of these ends, but with insufficient resources to do a good job at any of them. And many expressed doubt that a large, multipurpose residential facility is the appropriate vehicle to accomplish them in any case.

Some of the institutions visited in our study retest all inmates periodically (periodicity ranges from one to five years, with two institutions, in different States, testing at varying intervals based upon age and IQ level); others retest only when change of status is under consideration (e.g., placement in a new program, reported evidence of marked progress or deterioration, etc.). In some institutions what testing is done fails to meet even minimal standards of adequacy: in one, the position of psychologist is unfilled and has been for some time and no testing is being done; at another, the psychologist-resident ratio is so out of proportion that initial testing cannot be carried out for all incoming residents; and at a third, some residents (presumably being prepared for community placement) had not been tested in 30 years!

Periodic staff review of the status of all residents (and in at least some cases periodic psychological retesting as well) would seem essential to insure appropriate treatment and release to the community as soon as institutional care is no longer required. Equally important is that staff decision making be subject to review by some disinterested outside authority. The Task Force on Law of the President's Panel on Mental Retardation recommended a system of guardianship for institutionalized retardates, and in addition judicial review of the need for continued institutionalization when a resident reaches the age of 21, and every two years after that age. A majority of the judges and half of the institutional administrators whom we interviewed opposed such judicial review (generally on the ground that it is unnecessary and would be unduly burdensome and expensive). Yet many institutions do not now provide comprehensive staff review on a resident's attaining the age of majority or periodically thereafter, and for the most part there is no review of institutional decision-making by external authorities (only a small minority of retardates, whether in or out of institutions, have guardians).

The new (1965) New Jersey law, which has been called a "bill of rights" for retardates, requires examination of all institutional residents prior to their reaching the age of 21. If it is determined that a resident will need continued protection and supervision, his parents are notified and asked whether they plan to have a guardian appointed. If a guardian is not appointed at the instance of the resident's parents, the law requires the State to perform "such services for the mentally deficient adult as he may require, and which otherwise would be rendered by a guardian of his person." At the time the Institute was conducting the study, the law was too new for thorough evaluation, but it seems clearly to be a step in the right direction.

Our empirical data indicate that once a retardate enters a public institution, his "status" so far as the institution is concerned is that of "resident", and it makes little or no difference whether he is a minor or adult, or whether he entered voluntarily or was committed. Differences in the treatment of residents with respect to their exercise of jural "rights" (property management, marriage, making purchases, communicating with persons outside the institution, etc.) are based upon institutional judgements about their capacity and on staff practices in a particular ward or cottage, rather than upon the requirements of "law", about which institutional personnel are, for the most part, either uninformed or misinformed. (Allen, Ferster and Weihofen, 1968).

The chief sources of funds of institutionalized retardates are monthly benefit payments (Social Security, Veterans Administration, etc.), small sums provided by parents, earnings for work done in the institution or in the community while living at the institution, and occasionally fairly substantial sums coming to the retardate by inheritance or otherwise. The latter generally leads to a proceeding to appoint a guardian, but the other types of income are routinely received, held and managed by the institution (with or without statutory authority); indeed, benefit payments are often made directly to the superintendent as "substitute payee." All institutions co-mingle such trust funds, and all apply such funds, at least in part, toward meeting the expenses of the retardate's care.

Most allow the retardate to retain some portion of his money for his own use, but there is wide variation in the practices of the institutions we visited. The amounts assessed for cost of care ranged from a token $1 per month to "actual cost", which in one institution was as high as $215 per month.

State statutes are vague, but in most jurisdictions the parents of minor residents are first looked to for payment of the cost of their care (although formal collection procedures are rarely invoked). Perhaps here is an area for "bold new approaches." Why, for example, should not the State training school be considered in the same light as the public elementary school: an economic burden to be shared by all of the citizens of the community in the interest of all, rather than one to be borne only by those with children in need of such care and training. Indeed, why not provide a system of governmental payments to parents of retarded children capable of living at home, to enable them to provide the special care and training which might otherwise be available only through placement in a residential care facility?

It is generally agreed that the proportionately small number of residents now returned to the community by residential care institutions could be increased greatly if institutional and community resources were improved. There is some basis for optimism in a slight upward trend in recent years in such community placements and in a decreasing rate of return of those conditionally released. The primacy which should be accorded to habilitation of the resident in every institution is illustrated by the view expressed by a staff member in one institution when interviewed by our staff investigators:

> We aren't too concerned when one of our people on conditional release has to come back. We look on every day outside the institution as a step forward. If somebody has to come back for more training, that's all right. We'll try again and again until he can make it on his own.

Involuntary Sterlization: Is it Legally Defensible?

Today 26 of our States have eugenic sterilization laws, 23 of which are compulsory. The number of reported sterilizations per year has decreased steadily, from over 1600 some 25 years ago to less than 500 today; a decrease in large part due to the widespread rejection of the view that mental illness and mental retardation are hereditary.

Our empirical studies have shown, however, that the problems associated with eugenic sterilization are not confined to States with compulsory laws. In States with a "voluntary" statute, "consent" is often more theoretical than real. For example, it may be made a condition of discharge from an institution that the patient "consent" to sterilization. And in one State our field investigators observed a "voluntary" sterilization proceeding for a 6-year-old boy.

We found further that sterilization operations are conducted outside the institutions in States without sterilization laws. In one State, an institution official told our interviewers that he had performed 50 to 60 such sterilizations during the last 2 years. If true, his activities alone would give the State a sterilization rate higher than the reported rate of 20 States that have sterilization laws! Another institution physician in the same State told our field investigators: "I, on occasion, have let my knife "slip" in surgery and cut the tubes, but with most nurses present I would not do it, as they have large mouths." (Ferster, 1966)

The Task Force on Law and the several State Mental Retardation Planning Committees have equivocated on the matter of involuntary sterilization. The Institute has been unable to find persuasive scientific proof either of the inheritability of the defects for which sterilization is now being imposed, or of the fact that a child—even if of normal intelligence—will be seriously handicapped by the fact of being reared by a retarded parent. With the increasing availability of improved supervision and protective services, and of birth control devices far less drastic and irrevocable than surgical procedures, it is the author's view that there is no sound basis for sanctioning the continuance of involuntary sterilization—under whatever euphemism it may be applied.

The Problem of the Retarded Delinquent

Placement of the delinquent who is retarded is a problem in each of the States we studied. The following summary of a case followed by our field investigators illustrates the plight of the child no one seems to want:

> One day in late fall, the police of a large city found a child sleeping on a park bench. He replied to their questions incoherently and they brought him before the juvenile judge that same day. It was learned that he was 15 years old and had run away from home, and had done so many times before, and that a year earlier he had been before the court on a delinquency charge and had been diagnosed as moderately retarded. At that time a recommendation had been made for foster home placement because of the inadequacy of his home environment . . . but there are no foster homes for retarded teen-aged "delinquents," so he was returned to his home. The boy was sent to a juvenile detention center to await the court's decision, and while there was retested. The center's report to the court stated that his IQ was "estimated at 45 as he is below the (WISC) scale." It also stated that he had a speech impediment, "no conception of personal hygiene," and presented marked behavior problems. He was kept at the detention center pending a new hearing.
>
> At the second hearing held a month later, the judge announced that he was going to place the child in a residential care institution for the retarded. But in that State commitment by the juvenile court requires consent of the training school (and the judge had been unable to obtain such consent in a dozen similar cases since his appointment a year and a half before). The institution to which the boy was sent confirmed the fact of his retardation, but averred that "no vacancy is contemplated . . . now or at any time in the near future," and

> recommended placement "elsewhere". A second institution was tried—also unsuccessfully, although the judge found its officials "much more sympathetic."
>
> The boy was released by the court, and 2 weeks later was picked up by police wandering aimlessly in a bus station. When brought back to juvenile court it was found that he had been missing from home for 10 days. Fearing for the boy's safety, the judge hit upon the idea of instituting a commitment proceeding in the probate court, since the statutes are silent as to whether or not approval of the institution is required in such cases. Finally, nearly 2 years after the first referral to the juvenile court, the boy was admitted "under protest" by a State training school.

The point of the story is not exploitation of a legal "loophole" to gain admission for a child to an institution for the retarded, nor is it to question the wisdom of a law which restricts judicial commitment by requiring institutional approval. Rather it is our failure to create appropriate facilities to meet the needs of the retarded child with associated problems of behavior. In two of the States in which we conducted research, we found significant numbers of retarded children in juvenile correctional facilities, for the most part lacking in resources to meet the special needs of their mentally retarded residents. And in two others, we found new intensive care facilities, offering at last some hope of reaching the institutional outcast: the retarded "delinquent".

Guardianship and Protective Services

Some of the shortcomings of typical state statutes and procedures are the following:

1. The terminology is imprecise; and as has been pointed out earlier, because of inappropriate use of terms, a determination in one area may create the status of general "incompetency";
2. Guardianship proceedings are cumbersome and expensive;
3. Both the terminology employed and the procedures required create unnecessary stigma for the retarded person in need of help and unnecessary pain for parents seeking to insure that he will get it;
4. Institutionalization often creates at least a *de facto* if not a *de jure* incompetency;
5. Most courts do not have facilities for clinical evaluation, nor do they have sufficient staff to oversee the discharge of fiduciary responsibility by guardians or institutional personnel;
6. Often the alleged incompetent is not really represented by counsel, even when the procedure requires appointment of an attorney *ad litem*; and the determination is frequently made *ex parte*;
7. There is great uncertainty as to when a guardian of the person should be appointed, and what his duties should be;
8. There is no established procedure for review of the competency of an institutionalized person upon his reaching his majority;
9. Guardians of the person are rarely appointed for those in residential care institutions;
10. Guardianship is an "all or nothing" situation; although in many cases partial or limited guardianship is all that is required;
11. Few States have established a system under which a state agency can assume some or all of the functions of a guardian when there is no one else who can fill this role;
12. In part because of lack of community resources, and in part because of misconstructions of existing law and regulations, in some States it is necessary to go through a commitment proceeding to receive needed protective services. (Allen, Ferster and Weihofen, 1968).

No Plan for Retardates' Future

Our field investigators interviewed the parents of more than 50 retarded children and adults in half a dozen States to determine what, if any, planning had been done for the future of the retardate. The interviewees were selected at random, but many of the names came from lists supplied by the National Association for Retarded Children. Hence, as a group they were not representative of all parents of retarded children, but rather of those parents concerned enough about the welfare of their own and other retarded children to have become involved in NARC activities. Most were middle class families (with a fair sprinkling of professional persons); half of their retarded children were classified as "educable" and all but 13 lived at home. Most of them had done, they said, "some thinking" about preparing for their child's future.

We were surprised by what we found. None of the adult retardates had either a guardian of the person or estate, although two had substitute payees for Social Security benefit purposes. Few of the parents of minor children had made thoughtful plans for the future of their children, and most were ignorant about such important facets of planning as: testamentary guardianship, the status of their children on reaching the age of 21, and what can be accomplished through an *inter vivos trust*. Much of their planning was inappropriate: wills out of date or invalid, trust arrangements inadequate; and in several cases children had been in effect disinherited on the erroneous assumption that any estate given to the child would be taken to reimburse the State for the cost of his care.

But fault does not lie exclusively—or even primarily—with the parents. The inadequacy of community facilities and services; the largely unrelieved financial burden of providing for a retarded child; the fact that hospitalization and health insurance coverage may not include the retarded child; the paucity of comprehensive evaluation and counseling services; the ignorance of most lawyers, physicians and other family advisors about the problems involved in planning for the retarded; the stigma and expense of guardianship—all seem to surround the parents with an impenetrable curtain of confusion and frustration, defeating every effort to plan effectively.

In several States there are imaginative new legal approaches: New Jersey now requires that all retardates receiving services from the State be examined at age 21; parents or next of kin are encouraged to obtain a private guardian if the retardate needs such help, but if they wish it, the Division of Mental Retardation will perform the functions of a guardian of the person. Louisiana has a simple, inexpensive procedure whereby the parent's guardianship (tutorship) of a child may be continued past the child's reaching the age of majority if he is mentally retarded. In Connecticut, new duties have been reposed in the Office of Mental Retardation, located within the Department of Health, whose records of children in need of services are now fully computerized. Minnesota has had for a number of years a system of State guardianship (but cf. Levy, 1965). And California, with its emphasis on community-based services, created in 1965 a number of regional Diagnostic, Counseling and Service Centers. In 1968, guardianship services were added to the package, under legislation, similar to the earlier "personal surrogate" bill which failed of passage. Although rarely used, Washington's Co-Custody and Parental Successor laws are worthy of study. And major innovative efforts are under way in New York, Ohio and other States.

The major concern of parents—will there be someone to "look out for" their retarded child when they are gone—may be to a great extent relieved if voluntary "retardate trust" plans, now in existence in Maryland, Massachusetts and Michigan, prove successful. These plans provide limited estate management, but appropriately emphasize personal contact and protection.

Again, passing a law or adopting a "plan" will not alone solve all problems. There must also be: education about the laws and regulations which affect the retarded and their families—for parents, for institutional personnel, for community workers and for lawyers as well; sufficient funding to provide the differential services needed, preferably within the retardate's own community; and understanding and effective workers to administer the program.

In an earlier paper ("Legal Norms and Practices Affecting the Mentally Deficient", 1968), the author noted that "protective services" fail to protect:

1. when legal proceedings become routinized and *pro forma*, and decision-makers lose sight of both the nature of the services available and the needs of the people to be served;
2. when there is a lack of adequate staff and physical facilities;
3. when important decision-makers are ignorant of them or their appropriate use;
4. when they impose coercive sanctions unnecessarily, or for

longer periods than necessary, or when more appropriate noncoercive measures are available;

5. when the legal provisions under which they may be rendered are phrased in terms, which, because of their ambiguity or inappropriateness, make it difficult to identify the categories of persons eligible to receive them;

6. when custodial care, because of ignorance, or because of its ease of application, becomes the treatment of choice over other protective services more appropriate to the needs of the retardate (in all too many of the jurisdictions we studied, institutionalization has become the "poor man's guardianship");

7. when they are rendered by a multiplicity of agencies with ambiguously defined, and often overlapping, jurisdiction;

8. and, perhaps most important, when they do not respect the dignity and worth of the individual.

The Retarded Offender

Although there is a paucity of factual information about mental retardation and crime, there has been no shortage of opinions about it through the years. About a half-century ago, it was pretty widely believed that every intellectually impaired person was likely to be delinquent, and that most criminal offenders were such because of impaired intellect. The polemicists have now come full circle and it is today just as stoutly maintained by some members of the scientific, legal and correctional communities that mental retardation bears no causal relationship to crime. Indeed this view is so strongly held in some quarters that when staff members of our Institute have discussed the preliminary findings of our researches, the most strenuous objection has been voiced by persons ordinarily in the vanguard of liberal reform. As the author once noted:

> . . . in our zeal to dispel the chimeras and rubrics that have existed so long, we may have fallen into another kind of error. There seems to be developing a sort of reaction formation in which it has become fashionable to deny that gross intellectual deficit plays any significant role in producing criminal behavior. (Allen, 1966)

In 1963, a questionnaire survey was made of all correctional institutions in the country with the exception of jails and workhouses where misdemeanants and minor offenders are confined. Responses were received from over 80 percent of the institutions contacted, housing some 200,000 offenders, of which number, the reporting institutions have I.Q. records on about half. The following were among the findings made, based on analysis of these records:

1. About 9.5 percent of prison inmates can be classified as mentally retarded, using I.Q. 70 as the cutoff point (it is estimated that about 3 percent of the general population is mentally retarded).

2. Although more than 70 percent of the reporting institutions routinely test the intelligence of inmates on admission, a number of different tests are used, and testing procedures vary widely; several reporting institutions make no effort to test the intelligence of their inmates.

3. 1.6 percent of the inmates had reported I.Q. scores below 55, ranging down to a low of 17.

4. There is a general lack of mental health manpower resources within the institutions and consequently virtually no special programs for retarded inmates:160 institutions, with nearly 150,000 inmates, are served by 14 full-time psychiatrists and 82 full time psychologists; and more than half of the institutions reporting offer no program of any kind for their retarded inmates —not even a single special education class. (Brown and Courtless 1967).

In the criminal law-correctional phase of the Institute's study of the mentally retarded and the law, six adult correctional institutions in six different States, each of which had reported housing inmates with IQ's below 70, were selected, taking into account the character of the institution, the availability of records, and geographic location. To each of the institutions we sent a field worker, who compiled from prison records a list of all inmates identified by the institutions as retarded, selected a random sample from this list for retesting, and determined the type and manner of institutional testing and the nature of any educational or other rehabilitative programs provided by the institution for its allegedly retardate population. He also collected detailed socio-psychological, socio-economic and criminological data on each of the inmates in the sample.

The sample was then retested by a second member of the team, a clinical psychologist, using the Wechsler Adult Intelligence Scale, Draw-a-Person, and Thematic Apperception tests. The third member of the team, a lawyer, then analyzed the legal data for each case in the sample, including examination of trial transcripts, and interviews with judges, prosecuting and defense counsel, probation officers, and police personnel involved in each case. In this later facet of the study, we sought answers to such questions as: at what point, if at all, was an attorney appointed to represent the accused; was a confession or other statement to the police offered in evidence, and was objection taken to it; was the issue of competency to stand trial raised; was there a referral for an examination or observation; was the defense of lack of criminal responsibility asserted; was there a pre-sentence investigation; and what were the dispositional alternatives available to the court? The primary focus of inquiry was to determine at what point, if at all, significant decision-makers became aware of the fact of the defendant's mental retardation; and, if it was not discovered in the course of the criminal trial, why this was so; and if it was discovered, what effect, if any, it had.

Intelligence Tests

Correctional institutions use a number of different tests of intelligence; some are given to large groups of inmates as part of the admissions procedure—sometimes using other inmates to administer and score them. Surprisingly, despite this fact, we found institutional testing to be a fairly reliable indicator of mental retardation. The mean I.Q. of the sample of 51 inmates whom we retested was 66.0, compared with a mean I.Q. on institutional testing of 62.4. Further, we found 74 percent of the sample to fall within the retarded range, with an additional 8.7 percent testing in the borderline range (I.Q. between 70 and 74). Of course disparities were also discovered. In one State the "Otis Quick Scoring Test" is used. On that test the mean I.Q. of the supposedly retarded inmates was 61.8; our retesting of a sample of that group showed a mean I.Q. of 77.8, with only one inmate in the sample scoring below I.Q. 70.

Projecting the percentage of retarded inmates identified by the institutions responding to our initial survey to the total prison population, there are in American prisons today nearly 20,000 adult offenders who are substantially intellectually impaired, some 3300 of whom are classifiable as moderately to profoundly retarded. But the problems which these offenders present transcend their numbers. And they are rejected at every point where help might be given: by those concerned with treatment for the mentally retarded because they are "criminal", and by corrections because to meet their special needs would exhaust the limited resources of most penal institutions.

The Task Force on Law of the President's Panel on Mental Retardation declared, as though it were axiomatic, that: "There is no reason to believe that the small percentage of the mentally retarded who ran afoul of the criminal law are prone to commit crimes of violence." Our findings suggest that this rubric—so long accepted in refutation of the once widely held view that all retardates are potential killers—could bear reexamination.

United States Bureau of Prisons statistics indicate that a little over one fourth of all inmates of adult penal institutions were sent there for having committed assaultive crimes against other people (as opposed to property and other types of offenses), and that about 5 percent were convicted of some degree of criminal homicide. The largest single offense category is burglary—breaking and entering, which includes nearly 30 percent of all inmates.

Of the inmates reported by the institutions responding to the Brown-Courtless Questionnaire as having I.Q.'s less than 70, a sample of 1000 was selected with measured I.Q.'s below 55. The proportion of this group who had been committed on conviction of burglary—breaking and entering—corresponded closely to the figure cited by the Bureau of Prisons for the total prison population (28 percent). However, among this grossly retarded group, 57 percent had been convicted of crimes against the person, and the percentage convicted of homicide was three times as high as that of the total prison population (15.4 percent). And among 50 prisoners in the six States selected for further empirical research, 72 percent of the sample selected for retesting who were found to be retarded had been incarcerated for crimes against the person and 36 percent for some degree of homicide. Indeed, the most frequent crime committed by inmates identified on retesting as retarded was first-degree murder, which accounted for nearly 21 percent of the total.

Perhaps our sample of half a hundred inmates is too small for this apparent predominance of violent crimes to have much significance. Perhaps also the proportion of retarded prisoners who have committed such crimes is inflated by the fact that the retardate is more easily apprehended, more prone to confess, more likely to be convicted, and will probably be incarcerated longer than the nonretarded offender. Also, one might assume that some of the retardates who commit nonassaultive crimes are diverted from the criminal trial process and committed to institutions for the mentally retarded (although we found no evidence that this occurs in any of the courts and other agencies in which our researches were conducted). And finally, it may be more accurate to state that both mental retardation and crime are largely products of certain socio-economic and cultural factors (President's Committee, 1968), than to postulate a causal relationship between the two. But however the results of our inquiries may be qualified in light of these factors, one fact rather clearly emerges: that the special problem of the mentally retarded offender warrants much greater attention than it has ever been given in the past.

There are several points in the criminal trial process at which the defendant's retardation might be expected to be revealed: in determining his competency to stand trial; in considering the admissibility of his confession; in resolving the issue of his criminal responsibility (insanity); or in the course of a referral for mental examination. In fact, however, it is not discovered, or if it is, it plays no significant part in the outcome of the case. An important facet of the problem, of course, is that none of these legal procedures operates automatically; rather, the issue must be affirmatively raised. And the system works in such a way as virtually to insure that the issue will *not* be raised. Another factor is the lack of opportunity presented by the typical criminal trial for discovery of gross impairment. Most of the prisoners in our sample were poor, most were Negro, and most had appointed counsel who spent little time with them. The trial was often little more than a formality; more than 95 percent of the defendants either confessed or pled guilty, and the entire proceedings—from arrest to incarceration in prison—were often completed in a matter of weeks.

Finally, the following excerpts from our interview data suggest still another dimension of the problem:

From a prosecuting attorney, discussing a subject retested at I.Q. 57:

> *. . . we all thought he was dumb, but he was a mean ____________, and we were all a little afraid of him.*

From a public defender, several of whose clients were identified as retarded in prison:

> . . . *I don't recall that any of my clients were retarded.*

From a judge, commenting on a retarded defendant convicted of first degree murder:

> . . . *He did appear somewhat slow, but most of these migrant farmworkers are retarded to a certain extent anyway.*

And from a psychiatrist, asked to render a report in the only case in our sample in which the accused pled "insanity":

> . . . *In my opinion he could be certified as a mental defective and committed to an appropriate institution. However, in my opinion he is sane and responsible in law for his actions both at the time of the alleged crime and since.*

Only a small minority of the mentally retarded get into trouble with the law. But for those who do, the criminal trial process is not equipped to identify them, or it includes them under provisions designed for the mentally ill (and perhaps, commits them "until recovery", which, for the retardate may well mean commitment "for life"); and the correctional system has not provided rehabilitative care appropriate to their special needs.

(*For References see page 37*)

Note: The legal and law-related problems of the mentally retarded are presented first, and in much greater detail than those of other disabled and disadvantaged persons for two reasons: First, because the author has just completed a three-year empirical study of the operation of laws and administrative regulations affecting the retarded and their families, under the sponsorship of the National Institute of Mental Health (MH 01947); and second, because the retarded offer an excellent point of departure for a general discussion of legal rights of the handicapped.

Some of the thoughts expressed herein were first presented by the author at the First Congress of the International Association for the Scientific Study of Mental Deficiency, at Montpellier, France (Sept. 18, 1967), and at the Fourth Congress of the International League of Societies for the Mentally Handicapped at Jerusalem, Israel (Oct. 21, 1968). Portions hereof will be included in a chapter entitled "Law and the Mentally Retarded," in Menolascino, F., ed., *The Psychiatric Aspects of Mental Retardation,* to be published in 1969 by Basic Books, Inc.

The Mentally Ill

The National Association for Mental Health reports that there are some 753,000 patients under psychiatric care in hospitals, 173,000 on trial visit or in supervised community care, 1,350,000 in out-patient care in public and private clinics, and an estimated 20,000,000 persons in this country who will at some time suffer from mental or emotional illness of sufficient degree to need professional help: one in ten of us.

Albert Deutsch testified in 1961 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. He spoke movingly of the state mental hospital patient:

> Let us trace, briefly, the *via dolorosa* of the typical mental patient from the time of admission to the time of discharge keeping in mind that there are notable exceptions in some communities and some States:
>
> Firstly, there are the consequences of our outmoded, often outrageously unjust, commitment laws in most States. The mental patient is "suspected" of being insane. He or she is "apprehended" or "arrested" by a sheriff or other law-enforcement official. In many instances, he is thrown into jail and lodged there like a criminal, awaiting determination of his mental status . . .
>
> If adjudged insane, he is committed by court order much as a criminal is committed to prison. Although modern psychiatry has demonstrated that individual mental patients differ vastly in their capacities for responsibility, mental hospital commitment in most States automatically strips them *en masse* of specific civil rights—sometimes of all such rights, regardless of their individual capacity . . .
>
> The chronically acute shortage of physicians in most wards makes the term "psychotherapy" a hideous mockery for most patients. In most public mental hospitals, the average ward patient comes into person-to-person contact with a physician about 15 minutes every month —not a day or a week, but a month. The wonder is that so many patients achieve social recovery under these dismal circumstances. The grim tragedy of it all is that reliable psychiatrists tell us that the recovery rate could be doubled in many mental hospitals if modern therapeutic procedures were put to optimum use.
>
> In return for depriving the institutionalized mental patient of his civil rights, we promise him treatment for

> his illness. In failing to redeem this pledge, we not only do not aid his recovery; in many cases we make him worse . . .

A 7-year empirical study of hospitalization and discharge, sponsored by the American Bar Foundation (Rock, 1969) provides ample proof that things have not changed very much since those hearings on the "Constitutional Rights of the Mentally Ill."

For example, it was found that commitment—in many States with all the demeaning accoutrements of a criminal prosecution as described by Deutsch—is still the principal, and in some areas the only basis of admission. In relation to State mental hospitals, the recent study revealed that, "Almost without exception and despite their size, these institutions are unable to meet the needs of the population they are called upon to serve. All but a few of the institutions studied operate at 20 to 50 percent above their official bed capacity. Further, the generally small size of medical staffs and the relatively small number of trained psychiatrists in public hospital practice precludes care of all but a few patients at anything above a bare minimum."

Another recently published empirical study has verified the *de facto* incompetency which results from hospitalization, even in states with statutes declaring that the fact of commitment shall not operate to deprive patients of their civil rights (Allen, Ferster and Weihofen, 1968). Some of the findings of that study are that:

1. The effect in law of a hospitalization order on the competency status of a patient varies from State to State. In a few states the hospitalization order is also an adjudication of incompetency; in others, it results in at least presumptive incompetency; in still others there is a complete legal separation of hospitalization and incompetency;
2. In many States the effect of a hospitalization order on competency cannot be determined from the written law;
3. It is also unclear from the law of many states how voluntary or temporary observational hospitalization may affect competency;
4. In some States which purport to have separated hospitalization and incompetency, the rights of patients who have not been adjudicated incompetent are markedly restricted by administrative regulations;
5. In some States in which a hospitalization order renders one legally incompetent, discharge from the hospital does not effect a restoration to legal competency. Thus, the status of incompetency persists even after termination of the factual circumstances which produced it;
6. If a patient does not have a guardian, his legal status as "competent" or "incompetent" does not determine whether he may execute a legal instrument, vote, hold a driver's license, marry, make a will, and the like. While he is in the hospital, officials of the hospital decide whether or not to permit him to exercise any or all of these jural and civil rights, and the fact of his legal status is not even an important factor in their decision-making about him;
7. Hospitals manage and control the expenditure of patient funds—often without statutory authority; and without a determination of the patient's incompetency.

Ignorance of law and of the legal rights of patients, according to the findings of the American Bar Foundation team, (Rock, 1969) is as widespread in and about institutions for the mentally ill as the Institute of Law, Psychiatry and Criminology found them to be in the case of the mentally retarded (see preceeding section). And for some patients those whose labor on institution farms, laundries, bake shops, machine shops, canteens, etc. helps the institution to continue in operation despite inadequate appropriations from the State—abridgement of their right to treatment, and perhaps even to release when no longer in need of residential care, seems almost deliberate:

> The assignments (to "industrial therapy") tend to be based upon the needs of the institution rather than on the needs of the individual patient . . . We found no evidence that the release of a patient would be *denied* because he was "needed" in an industrial assignment. At worst the impression we had was of *acceptance of the status quo* of these patients and *a lack of effort to motivate them to return to the community.*

In 1964, following hearings on the rights of the mentally ill, a new law was enacted governing hospitalization in the District of Columbia (78 Stat. 944 [1964]; now D.C. Code Sec. 21–501 to 591 [Supp V, 1966]), which has come to be known as the Ervin Act, for Senator Sam Ervin, under whose chairmanship the hearings were held. The following are among its provisions:

1. Procedures governing voluntary and nonprotesting hospitalization were liberalized and simplified;

2. Emergency hospitalization is permitted on the authority of a policeman or family physician, but limited to a period of not more than 48 hours, unless the administrator of the hospital files a petition for continued emergency hospitalization: such continued hospitalization may be granted by the court, but is limited to a period of seven days, and the patient has an absolute right at any time to a hearing;

3. An order for involuntary hospitalization for an indeterminate period may be made only on a finding that the person: ". . . is mentally ill, and because of such illness is likely to injure himself or others if allowed to remain at liberty" (many State hospitalization procedures permit involuntary hospitalization merely on certification that someone is "in need of treatment");

4. Hearing must be held as a prerequisite of such determination, at which, "The alleged mentally ill person shall be represented by counsel . . . and if he fails or refuses to obtain counsel, the court shall appoint counsel to represent him;"

5. Any person hospitalized involuntarily is entitled 90 days following the order, and every six months thereafter, to have a current examination of his mental condition, and to have his own physician participate in his examination; and to test the propriety of his continued detention at any time by habeas corpus;

6. "Any person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment;"

7. No mechanical restraint may be applied unless prescribed, with a full statement of the reasons therefore made a part of the patient's records;

8. "No patient hospitalized pursuant to this Act shall, by reason of such hospitalization, be denied the right to dispose of property, execute instruments, make purchases, enter into contractual relationships, vote, and hold a driver's license, unless such patient has been adjudicated incompetent by a court of competent legal capacity . . ."

As has been noted in another section, laws are not self-executing. They must be understood, accepted, and applied by very human agencies in order to be effective. But a law like the Ervin Act is an excellent start.

There are a number of areas of criminal law determinations (competency to stand trial, the admissibility of confessions, criminal responsibility, sexual psychopath and defective delinquent procedures, etc.), but their consideration here would unduly protract, and unnecessarily complicate, the discussion. Suffice it to say that there is something of a trend toward improving procedures for the identification of the mentally ill in criminal proceedings, although treatment of offenders in correctional and mental health institutions remains far below minimal standards (Lindman and McIntyre, 1961; Crime Commission Report, 1967; Goldstein, 1967; and Allen, Ferster and Rubin, 1968).

Wider public education has removed much of the stigma formerly associated with mental illness. But a great deal remains. There are still discriminations practiced against former mental patients in employment, in licensure, in adoptions, in gaining or retaining custody of one's children, and in many other areas of life. Such discriminations may even be built into law. For example, under Title XIX of the Social Security Law (Medicaid), the Federal Government shares the cost of treatment for indigent persons if received in a general hospital, but not if received in a mental hospital; and under Title XVIII (Medicare) there is a lifetime limit of 190 hospital benefit days for patients receiving treatment in a mental hospital, but no limit on the care received in a general hospital.

Ancient peoples sometimes stoned the mentally ill as "possessed;" in our own country disturbed people were once hanged as witches; and we still "put folks away" in human warehouses, tended by untrained people, and often deprived of the rights of citizenship we enjoy without a thought about how intolerable life would be without them. But the mentally ill are a part of society and their rights are worthy of protection. In the words of Terence: "I am a human being, and nothing that is human is alien to me."

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Alcoholics and Drug Addicts

Alcoholics

The report of the Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice (the National Crime Commission) begins with the alarming statistic that one arrest out of every three in America in 1965, was for the offense of public drunkenness (Task Force, 1967). The total number of such arrests—two million—was substantially the same in 1967, with at least another million drunkenness-related arrests (disorderly conduct, loitering, driving while intoxicated, vagrancy, etc.) (F.B.I., 1968). A very substantial number of these arrestees are alcoholics, for whom the process of arrest, a night in the drunk tank, and back on the streets is a regular occurrence. Some have made the round trip from the gutter and back again hundreds—yes, hundreds—of times. In total, these alcoholic repeaters may spend many years of their lives in jail—on the installment plan.

As yet, no studies exist which clearly differentiate an alcoholic from a nonalcoholic in the chronic drunkenness offender group. (Washington Univ., 1969) However, the most widely accepted definition is that developed by the World Health Organization:

> Alcoholics are those excessive drinkers whose dependence upon alcohol has attained such a degree that it shows a noticeable mental disturbance or an interference with their bodily and mental health, their interpersonal relations, and their smooth social and economic

> functioning; or who show the prodromal signs of such development. (W.H.O., 1952)

The most common definition in statute is illustrated by Indiana's commitment law:

> The term "alcoholic" means any person who chronically and habitually uses alcoholic beverages to the extent that he loses the power of self-control with respect to the use of alcoholic beverages, or any person who chronically and habitually uses alcoholic beverages to the extent that he becomes a menace to the public morals, health, safety or welfare of the members of society in general. (Ind. Stat. Ann. [Burns] 22–1502/b])

But there is no general agreement on definition. Some states simply use terms like "habitual drunkard," and others refer to a certain number of convictions of a drunkenness offense, or require that the condition be of at least a year's standing.

It is estimated that there are about five million chronic alcoholics in the country, (B.U., 1965), of whom about 6000 are inmates of mental institutions. (Lindman and McIntyre, 1961). Most alcoholics (or at least chronic excessive drinkers) are not residents of mental hospitals or of skid row; rather they are the "problem drinkers" who live at home, and bring incalculable harm upon themselves and others in highway injuries and deaths, broken homes, wage loss, and blighted lives (NIMH, 1967).

Until recently, it seemed that the courts were once again going to respond to a need that the legislatures have not met, and require by force of decision the construction of facilities to handle chronic alcoholics arrested for public intoxication. Extending the effect of a 1962 Supreme Court decision striking down a California law which it construed as making the "status" of drug addiction a punishable offense (*Robinson v. California*, 370 U.S. 660, 1962), the United States Courts of Appeals for the Fourth and District of Columbia Circuits ruled in quick succession that a chronic alcoholic may not validly be convicted of public drunkenness, since such intoxication is a sympton of a disease (*Driver v. Hinnant*, C.A.—4, 356 F 2d 761, 1966; *Easter* v. *District of Columbia*, C.A.—D.C., 361 F 2d 50, 1966). In the latter case, Judge Fahy cited the compelling language of the Supreme Court in the earlier Robinson decision:

> In the light of contemporary human knowledge, a law which made a criminal offense of . . . a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

However, it was not to be. In a recent decision (*Powell v. Texas*, 392 U.S. 514, 1968), the United States Supreme Court ruled that criminal penalties for public intoxication may constitutionally be imposed upon alcoholics. Although there was no clear majority of the court on any significant point, the justices seemed moved by the "lack of agreement" among members of the medical profession as to what constitutes alcoholism, and their lack of success in treating it. Justice Marshall wrote for himself and three colleagues, distinguishing *Robinson* on the ground that it had thrown out a statute punishing one for being a narcotic addict, whereas the Texas statute at issue in *Powell* did not purport to punish the alcoholic for his alcoholism, but for his bad taste in choosing too public a spot in which to be drunk. The Justice was also concerned with the impact a different decision might have in the area of determinations of criminal responsibiity (the insanity defense); and with the lack of alternate facilities if the drunk tank were put constitutionally off bounds (hospitals, for example have been notoriously unreceptive to alcoholic patients [Pittman and Sterne, 1965]).

The Crime Commission recommended in its final report (1967):

1. That drunkenness not be made a criminal offense;
2. That communities establish detoxification units as part of comprehensive treatment programs;
3. That aftercare resources be provided and coordinated;
4. That research by private and governmental agencies be conducted into alcoholism, the problems of alcoholics and methods of treatment.

Since that Report was issued, detoxification centers have been established in a number of communities, and comprehensive programs started in a few. The task is now squarely up to the legislatures. In considering how to discharge it, they might remember the words of Peter Hutt:

> At some future time, hopefully, the policemen who ordinarily spend much of their time sweeping the streets of drunken derelicts will be released from that unpleasant and unnecessary chore, in order that they can get back to the business of fighting serious crime. (1967)

Drug Addicts

In numerical terms, drug addiction would seem to be less of a problem than alcoholism. The Bureau of Narcotics maintains a file, which as of December 31, 1965 contained the names of just over 57,000 opiate addicts. Even the largest estimates—running as high as 200,000—are low compared with estimated numbers of alcoholics in this country. And like alcoholism, there is a problem of definition of terms, with various of the experts emphasizing physical dependence, psychological habituation, "loss of self control," adverse behavior, "assimilation into a special life style of drug taking." (Crime Commission, 1967). Yet, despite the relatively small number of known addicts, and the vagaries of definition, few knowledgeable persons would disagree with the recent characterization of the problem by Honorable Mary E. Switzer, who has, for many years directed the nation's efforts to rehabilitate the handicapped, first as Commissioner of Vocational Rehabilitation, and now as first Administrator of Social and Rehabilitation Service: "Of all the ills of our society, none is more grievous than narcotic addiction." (1966)

As observed by the Task Force on Narcotics and Drug Abuse of the President's Commission on Law Enforcement and Administration of Justice:

> Since early in the century we have built our drug control policies around the twin judgments that drug abuse was an evil to be suppressed and that this could most effectively be done by the application of criminal enforcement and penal sanctions. Since then, one traditional response to an increase in drug abuse has been to increase the penalties for drug offenses. (1967)

Stringent legal prohibition dates back to the federal Harrison Anti-Narcotic Act of 1914. That law, with even more rigorous penalties than the original, is still on the books, and has spawned a numerous progeny. Penalties under the Harrison Act, which applies to cocaine and the opiates, have been increased twice, and now stand at two to ten years for a first offense, with sentences up to 40 years for subsequent offenses. Under the Narcotic Drug Import and Export Act, there is a mandatory minimum sentence of five years (up to a maximum of 20 years) for the first offense of unlawful sale or importation, and a mandatory minimum of ten years (and a maximum of 40 years) for subsequent offenses. Both laws restrict suspended sentences, probation and parole; and under each, possession gives rise to a presumption of violation. The Marijuana Tax Act applies the Harrison Act penalties to transactions in marijuana, with again a presumption of violation on a finding of possession; and the Drug Abuse Control Amendments of 1965 apply somewhat lesser penalties to dissemination or possession of barbiturates, amphetamines and other "dangerous drugs" (including LSD).

Most States have enacted the Uniform Narcotics Act, or something similar to it, and a "dangerous drug" act roughly paralleling the Drug Abuse Control Amendments. Penalties under State laws vary widely, but most are severe. Some States provide for a maximum sentence of life imprisonment, and in a few, the death penalty is added for sale to a minor. The almost unanimous trend is toward increasing the severity of penalties in all States. (Eldridge, 1967).

While State legislatures and the Congress have sought to solve the problems of drug abuse primarily through the medium of stricter law enforcement and more and more horrendous sanctions, other groups, including a Joint Committee of the American Bar and American Medical Associations (1961) have questioned the wisdom of our present policies. The President's Advisory Commission on Narcotics and Drug Abuse succinctly, if tersely, noted the dichotomy of views:

> The Bureau of Narcotics maintains that the present severe penalties act as a powerful deterrent. The Commission does not agree. (1963)

The Commission has recommended that mandatory minimum sentences and denial of the hope of parole be done away with; that lesser penalties be substituted for possession for use as opposed to possession for sale, and for marijuana violations as opposed to transactions in the opiates. The Commission also recommended greater judicial discretion in sentencing offenders. These recommendations have been largely ignored by Congress and the State legislatures, although to an increasing extent the Commission's views are shared by the general public. In a recent (1967) Harris poll, for example, although 94 percent would give a long prison sentence to an adult who sold narcotics to a minor, 85 percent said that hospital rather than jail was the place for an addict arrested for drug use. Somewhat similar recommendations were made by the President's Commission on Crime in the District of Columbia (1966); and the President's Commission on Law Enforcement and Administration of Justice declared that:

> State and federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators, taking account of the nature and seriousness of the offense, the prior record of the offender and other relevant circumstances. (1967)

In 1962, the Supreme Court of the United States struck down a California criminal statute:

> This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he re-

> forms" . . . To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold. (*Robinson v. California* 370 U.S. 660)

However, as noted in the discussion of alcoholism in the preceeding section, the scope of that decision has been rather severely limited by a later ruling of the Court. It seems clear that at least for the foreseeable future the Court will not strike down criminal statutes under which purchasers, sellers or possessors of drugs may be subjected to prison sentences greatly in excess of ninety days; nor will it require treatment instead of punishment as a constitutional imperative for one who commits a criminal offense (including the sale of drugs) in order to obtain the relief which his own addiction compels him to seek. Again, as with the problem of alcoholism, reform must come from the legislature.

Although the hospitalization laws of a number of states permit it, drug addicts have rarely been committed for treatment of their addiction until quite recently. (Lindman and McIntyre, 1961) California, in 1961 enacted new civil commitment procedures for addicts; New York followed the next year; and in 1966, the Federal Narcotic Addict Rehabilitation Act (28 U.S.C.A 2901) was passed. The national Crime Commission (1967) affirmed its belief "that involuntary civil commitment offers sufficient promise to warrant a fair test," but noted some of the objections that have been raised to the new laws, pertaining to persons against whom a criminal charge is pending:

1. that the issue of guilt or innocence of a criminal charge pending against the addict may never be determined;
2. that a mere showing of addiction is sufficient basis for commitment;
3. the inflexibility of the period of commitment (under Federal and New York laws it is three years) ;
4. exclusion from treatment of certain classes of offenders (under the Federal law, of: those charged with crimes of violence; those charged with unlawfully importing or selling a narcotic drug; those against whom a prior felony charge is pending; those with two or more prior felony convictions; and persons civilly committed because of narcotic addiction on at least three occasions).

In a paper presented at a Symposium on Drug Abuse held at Rutgers University June 3–5, 1968, the author dealt at some length with the apparent stepping-up of law enforcement practices, especially those directed against marijuana offenders, noting that:

> F.B.I. statistics show an increase in arrests for narcotic drug law violations of 82 percent during the period 1960–1966. In 1966, 41.1 percent of all such arrests were for marijuana violations . . . One out of every three persons arrested for such violations was under 21 years of age. And the number of arrests for persons 18 years of age and over for narcotic law violations in 1966 was greater than those for any other major offense except aggravated assault, burglary and larceny-theft. (Allen, R., 1968)

There is no lessening in the program of accelerated enforcement. In 1967, arrests for narcotics violations in cities over 2,500 population increased 57.5 percent over 1966 (three times the rate of increase of any other category of crime), and in suburban areas by 104.2 percent, " . . . influenced," in the words of the FBI Director: "primarily by marijuana arrests."

The Marijuana Problem

Monographs by consultants to the Task Force on Narcotics and Drug Abuse are included as appendices to the Task Force's Report (1967). They include a number of suggestions about present enforcement practices with respect to marijuana use: to bring marijuana under "drug abuse" rather than "narcotics" control (Gunn, 1968), to amend penal codes to make marijuana violations misdemeanors rather than felonies, and even to remove all criminal penalties from possession or use of marijuana. As was observed in a recent article in a national news weekly:

> The use of marijuana is fast becoming a social phenomenon rather than a legal nuisance. But medical science and the law have not kept up with the change. (*Time*, April 19, 1968)

In testimony before the Senate Subcommittee on Juvenile Delinquency, Dr. Stanley Yolles, director of the National Institute of Mental Health, noted that surveys indicate that about 20 percent of all college students report some experience with marijuana

(New York Times, March 7, 1968). The author's experience as a member of a student-faculty committee commissioned to draft a university drug policy would suggest that the percentage is far higher than that—and growing. (Allen, R., 1968).

Marijuana users, since the drug is not addictive, can hardly be deemed "disabled" (at least until they are caught and imprisoned) ; and they are not, for the most part, members of groups ordinarily thought of as socially or economically "disadvantaged." In the author's opinion, however, present law enforcement practices, including the current campaign against marijuana users, work against efforts more appropriately directed at meeting the problem of addiction, for a variety of reason, including:

1. the fact that such practices divert badly needed manpower and other resources from the provision of treatment and from other more productive areas of law enforcement;
2. the fact that horrendous criminal punishments and tight enforcement practices directed primarily against users and possessers of drugs have been notoriously unsuccessful in reducing addiction—rather they have deterred addicts from seeking needed medical help, and inflate the price of illicit drugs to the point that their sale has become a highly profitable venture for organized crime—well worth the risk of an occasional "bust;"
3. perhaps most significant, they are so patently inappropriate —and unfair—that they induce disrespect and contempt for the law.

For the truly "disabled", the regular user of heroin or other addictive drugs, whose dependency has probably reduced the entire creative potential of his life to a daily task of feeding his habit, usually at a cost both financial and physical that makes him a constant street criminal as well as a narcotics violator—the observation of Winick's really says it all:

> If it were as easy for the addict to remain off drugs as to be withdrawn from them, the problem would be fairly simple. But there is no community in the U.S. which has an integrated program of hospitalization, psychiatric treatment and rehabilitation (1962).

From the standpoint of the appropriate use of law, however, perhaps the following should be added as appropos of both alcholism and drug addiction:

> When penal treatment is employed to perform the function of social service, selection of those eligible for penal treatment proceeds on inadmissible criteria. Persons are selected for criminal conviction, not by reference to their moral character or their social dangerousness, but by reference to their poverty or their helplessness. Thus, we may object that such use of the penal process does not result in effective performance of the social service function. We may also object that it lacks equity and decency. (Allen, F., 1964).

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The Physically Handicapped

There are about a million blind and nearly-blind persons in the United States and between a million and a million and a half epileptics. And, since heart disease is one of the leading causes of death, one can assume that there are several times that many citizens suffering some degree of heart impairment—diagnosed or not. Every year 100,000 babies are born with defects and many of them will need to use crutches, braces or wheelchairs all or most of their lives. A few years ago a high percentage of them died in infancy; now, their chances of having a close-to-normal life span are far greater. Every year, automobile accidents take a greater and greater toll: of sight and limb as well as of lives. And every year the war in Viet Nam continues, thousands of young men—once strong of body—are blinded and crippled and maimed.

The principle of normalization (see page 7) would seem to be more easily applied to the physically handicapped than to any other group of disabled and disadvantaged. The crippled can be fitted with a prosthetic device to substitute for a missing limb; there is no prosthesis for a mind that has never developed. A guide dog can enable a blind man to go from place to place almost as easily as if he were sighted; but the boundaries of the slum ghetto are insurmountable for many of its residents. The deaf must learn to communicate through a wall of silence; communication is far more difficult when the barrier is a wall of prejudice such as is faced by the ex-convict. However, the apparent ease with which the physically handicapped can be integrated into the total society may be more apparent than real.

Often the greatest disablement which must be endured by the physically handicapped is not the physical defect itself, nor the unavailability of needed compensatory devices and training, nor even "prejudice"—in the sense that that term is applied to describe hostile or discriminatory treatment of blacks, or welfare recipients, or people with a criminal record. Rather, it is the ignorance and over-solicitude which characterizes the attitude of many Americans toward persons who are blind, or deaf, or orthopedically impaired: a belief that such poor, blighted creatures as these must be protected from the world, instead of helped to become part of it.

The stereotypes are all too familiar. One young man became totally blind at the age of 14, and was sent to a school where he could learn to make baskets out of cane. He was a miserable failure—the baskets he made were lopsided and unsalable, and his teachers despaired of him. But this poor, blind failure, after he left the workshop, successfully completed college and law school, and is now a lawyer and Chief of the Washington office of the National Federation of the Blind. His name is John Nagle. And he still can't weave a decent basket!

Epileptics, perhaps more than any other category of the physically handicapped, have borne the burden of public ignorance and excessive and inappropriate solicitude. (Barrow and Fabing 1956). There once were laws in a great many States severely restricting or prohibiting marriage, employment, drivers licensure and the like; and providing for involuntary hospitalization—and even sterilization—on no more proof than the fact that the person had suffered epileptic seizures. (Lindman and McIntyre, 1961). However, in recent years public educational campaigns and the development of medications which can more effectively control and prevent seizures have combined to reduce the extent to which such restrictions are applied. For example, although statutes permitting the sterilization of epileptics remain on the books in a number of States (Ferster, 1966), hospital administrators and health officials insist that they are not invoked—and have not been for some years—against anyone on the ground of his being an epileptic. The hospitalization of epileptics has declined greatly over the past several years, and continues to decline. (Lindman and McIntyre, 1961).

There is yet need—especially in the case of persons suffering from epilepsy—for legislative reform. In the last 15 years a dozen States have repealed statutes restricting the marriage of epileptics. However, in at least one state (West Virginia) the marriage of an epileptic is voidable. Wisconsin and Ohio have pioneered in enacting laws permitting issuance of a special driver's license to persons who have a physical condition which may produce periodic loss or impairment of consciousness, where the condition is in remission. Dean Barrow and Dr. Fabing, authors of the leading work on the subject (1956) and of several articles on the epileptic automobile driver, have urged the enactment of similar laws in other States (for a more extended discussion of the matter, see Appendix A–7, Operation of a Motor Vehicle, in Allen, Ferster and Weihofen, 1968). And it should be obvious that the insulting and scientifically unsupported hospitalization and sterilization laws still left on the books ought to have been repealed long ago.

Federal Resources

A number of Federal laws have been enacted in the past several years in behalf of the physically handicapped. In 1965, the Vocational Rehabilitation Act was amended to provide for greatly increased Federal funding: to encourage States to expand and improve their rehabilitation services; to introduce new techniques and services—especially for the severely disabled; and to facilitate the construction, staffing and improvement of workshops. In the same year, Social Security Law amendments authorized funds for training professional personnel for the care of crippled children, for grants to provide up to 75 percent of the costs of comprehensive health care projects for children and youth, and to expand the program of medical assistance for blind, disabled and dependent children. The amendments also included liberalization of the eligibility requirements for disability benefits. 1965 also saw enactment of the Elementary and Secondary Education Act, providing funds for projects in aid of educationally disadvantaged (including handicapped) children; legislation establishing a National Technical Institute for the Deaf; and PL 89–239, under which a quarter of a billion dollar program of grants was authorized to launch a major assault on heart disease, cancer and stroke. That was quite a year, especially when one considers that it also brought Medicare and Medicaid, and extensive appropriations to facilitate construction of community mental health centers and mental retardation facilities. Since 1965, amendments to the Elementary and Secondary Education Act have further augmented the grants program to encourage the development and improvement of State services to handicapped children; authorized establishment of Regional Resources Centers to improve educational techniques, and the establishment of centers for children who are both deaf and blind (primarily those so impaired as the result of the rubella epidemic of several years ago). The Handicapped Children's Early Education Assistance Act was enacted in 1968 providing support for experimental pre-school and early education programs for handicapped children. Amendments to the Social Security Act increased the authorization of funds to improve maternal and child health care and services to crippled children. Amendments to the Vocational Rehabilitation Act more broadly defined the target groups for rehabilitation services, including, among others, the deaf-blind, handicapped migratory workers, and the "disadvantaged." Other new laws established a National Eye Institute within the National Institutes of Health; authorized the Commissioner of Education to make grants to institutions of higher learning to foster development of special services for disabled or disadvantaged students; provided minimum wage regulation for handicapped workers in sheltered workshops.

Architectural Barriers Law

Perhaps the most important single piece of Federal legislation for the physically disabled in recent years is PL 90–480, which became law less than a year ago. In 1967, a national Commission appointed by the Secretary of Health, Education, and Welfare reported that "the greatest single obstacle to employment for the handicapped is the physical design of the buildings and facilities they must use." It found that more than 20 million handicapped Americans are "built *out* of normal living by unnecessary barriers:" by steps and curbs, inaccessible elevators, steep and narrow walks, narrow or revolving doors, lack of accommodations for wheelchairs, too narrow aisles, the absence of ramps and hand rails, unreachable light and alarm switches, failure to provide raised lettering on doors and in elevators for blind users, and many other such thoughtless and unnecessary obstacles. (Commission, 1967). The new law requires that every federally financed building designed, constructed or altered after the effective date of the act, be in compliance with standards which will permit access and use by physically handicapped people. Similar legislation should be enacted by every State, and the standards developed should be a part of the building codes applicable to all public structures.

Attitudinal Barriers

Even if all physical barriers were removed, however there would still remain the myriad of barriers erected by the ignorant and unthinking, often in a misguided effort to help and protect the impaired person. For example: a fully qualified Department of Education student was denied permission to participate with her classmates in student teaching because university officials feared that she would be unable to control her class. In order to get an apartment, a man confined to a wheelchair was required to sign a waiver, releasing the landlord and other tenants from liability for injuries resulting from their negligence. A qualified job applicant was rejected because he had a history of heart disease, and the employer feared the effect on the experience rating of the company's group disability plan if it were to hire such a "high risk" employee. A blind man was denied rental of a safety deposit box unless he would agree to joint ownership with someone who was sighted.

Motels and restaurants frequently refuse service to a blind person with a guide dog—or require that the dog be muzzled. The author is in possession of a letter from a former student who is now an Assistant Attorney General in one of our States, and who happens also to be blind. This brilliant young lawyer, who earned a Master of Laws degree with honors from The George Washington University, recalled that, while he was living in Washington, the most trouble he had in gaining admittance of his guide dog to a public place was on the day he presented himself for admission before the United States Supreme Court! Finally after much argument, he—and his dog—were allowed to approach the bench. It was a "first" for that distinguished tribunal, which has done more to protect individual civil rights than any other agency of Government!

The Federal Government has taken the lead in providing employment opportunities for the handicapped within its own structure. There is now, for example, a director of programs for the handicapped within the Federal Civil Service Commission, whose sole function is to further the employment of physically and mentally impaired persons in Federal Government work. Some States have established counterpart programs. But much more should be done; and the greatest need is not for enactment of new laws, but for the repeal of old prejudices. It may be, however, that in some areas at least—transportation, places of public accommodation, and perhaps even employment in businesses and institutions under Federal regulation—there should be a Federal Civil Rights Law, with appropriate sanctions, directed against the discriminations which are daily practiced against the physically handicapped, and whose effects are every bit as demeaning and as incapacitating as they are when directed against other citizens because of the color of their skin.

Better Laws Needed

Jacobus tenBroek has written extensively and authoritatively about the application of tort law to the disabled, and what he calls their "right to live in the world." (tenBroek, 1966). That right —the legal right to be abroad—demands special protection in the case of the disabled, including enactment of "white cane," "guide dog" and other appropriate legislation, and forthright judicial opinions in tort cases upholding the right of the crippled, the blind and the infirm to use streets and sidewalks and places of public accommodation in reasonable reliance on their safety, and without being deemed contributorily negligent for having the temerity to make use of them.

Legal determinations of disability also deserve mention. Workmen's compensation laws have been criticized because they operate to discourage successful rehabilitation of the injured workman. A number of things might be done to improve them; for example, Curran has suggested that "compensation benefits . . . be paid for anatomical loss or other impairment of function irrespective of rehabilitation to gainful employment." (1960). In addition, in the author's opinion, workmen's compensation laws which operate to penalize an employer who hires the disabled, should be changed. And finally, although there have been a number of improvements in the procedures for disability determinations under the Social Security Act, there is one which has not yet been made, and which is long overdue—the provision of counsel for applicants at both administrative and judicial levels. In a recent issue of the American Bar Association Journal, Allen Sharp quotes a Federal judge's observation that "it is as important for a Social Security disability claimant to have counsel when he is seeking benefits that may determine the future course of his life as it is for one accused of a crime when his future freedom is at stake." (Sharp,1969).

John Nagle, Chief of the Washington office of the National Federation of the Blind—the inept basket-weaver, but successful lawyer, referred to earlier—said recently:

> We, the organized blind, refuse to accept the traditional role granted by history to the blind person—as tolerated spectators, shunted to the sidelines of life—perpetual welfare dependents—creating nothing, contributing nothing, participating in nothing—denied full and equal

> status in society's struggle toward a better life . . . As an organization, we are seeking equal treatment, not preferential consideration . . . We reject emphatically and unqualifiedly the sterile security of a protected, custodialized existence—sheltered from life's uncertainties, excluded, too, from life's excitements and adventures, satisfactions and rewards . . .

No better statement could be made of the principle of normalization.

A beginning then has been made in meeting the real needs of the blind, and of other physically handicapped persons. But there is yet a significant gap in public understanding and acceptance of those needs. A good example of misguided concern for the handicapped is a State which is currently considering a bill to provide free fishing licenses for the blind. Most blind people can afford to buy fishing licenses. What they would appreciate far more is repeal of the State's law which permits the "management of any public conveyance, place of amusement or public accommodation" to require that a guide dog have a muzzle. Guide dogs do not need muzzles and sometimes, because they are not used to them, the muzzles reduce their effectiveness as guides. Here indeed is but another illustration of the adage that none is so blind as he who will not see!

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The Aged

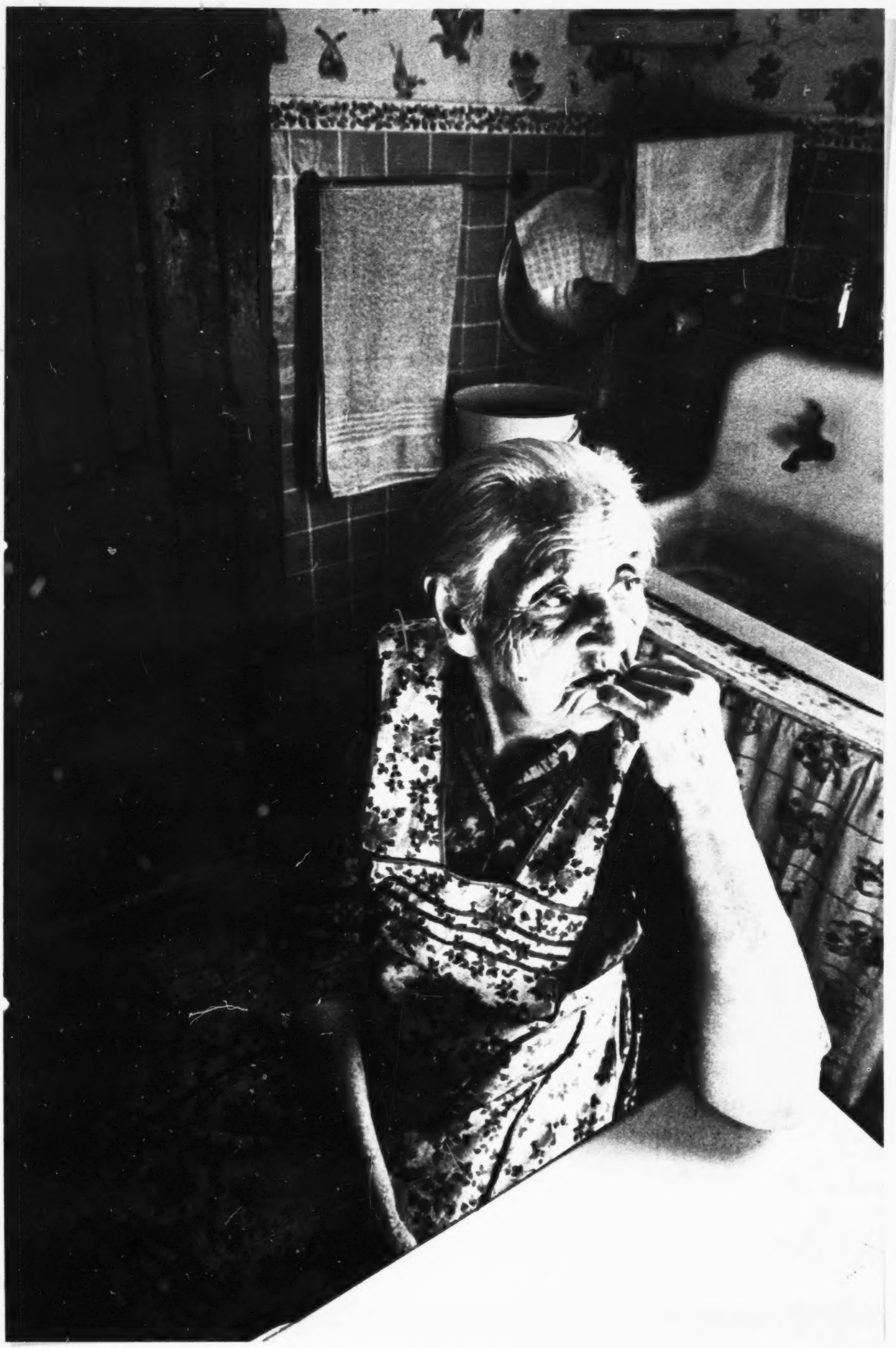
> The brochure writers and the publicists talk of the "golden years" and of "senior citizens." But these are euphemisms to ease the conscience of the callous. America tends to make its people miserable when they become old, and there are not enough phrases in the dictionary to gloss over this ugly reality. (Harrington, 1963)

There are today some 19 million American citizens over the age of 65—one in every 10 of us; a hundred years ago it was only one in 40. They can look forward to another 15 years of life, according to actuarial statistics—or perhaps dread them, if one can look beyond the arithmetic of the aging process and see its loneliness.

There are other, grimmer statistics that should be noted too. The 1961 White House Conference on Aging declared that in many States half of the citizens over 65 years of age live in poverty. A Special Committee on the Aging of the United States Senate reported in 1967 that of all persons over the age of 65, about 30 percent are below the poverty line, and another 10 percent on marginal incomes. A 1965 survey of persons receiving old age assistance revealed (H.E.W., 1967) that 41 percent live in inadequate housing, 18 percent are blind or near blind, 29 percent have a disabling heart condition, and 35 percent live alone—many of whom have no living children.

Persons 65 years of age or older make up only 9 percent of our total population but account for a much larger percentage of first admissions to public mental hospitals. Although the proportion of patients under 65 in mental hospitals has decreased during the past 20 years, the proportion over 65 has increased by 40 percent. (Allen, Ferster and Weihofen, 1968).

State mental hospitals in many areas have become dumping grounds for elderly people without relatives to care for them and without funds to obtain private nursing home care. The research team of the American Bar Foundation has just reported:



> Providing for the aged and infirm has historically been a county responsibility. Counties are notoriously parsimonious in this regard and sometimes have succeeded in establishing upper limits on their obligation. In one State the maximum assessment which can be levied against a county for the care of a patient is fixed by statute at $6.00 per month. If the hospital in this State determines that a patient is suffering from a "species of insanity or mental derangement as a result of old "age" but could be cared for by "ordinary home care methods," he is labeled a "senile custodial care case." In no instance was it felt that even a majority of the patients whose needs could be satisfied by extramural placement, or who would benefit from such placement, were being released from the State hospitals. (Rock, 1969)

Community Facilities for Care

It may be that some day the courts will force a change. On an afternoon in late September, 1962, the Washington, D.C. police took into custody a sixty year-old woman they found aimlessly wandering about in an apparent state of confusion. They took her to a mental hospital, and got an observation order from the court. She was later committed, on testimony by a hospital psychiatrist that she was suffering from a senile brain disease, "chronic brain syndrome, with arteriosclerosis with reaction." The psychiatric witness said she was not dangerous, but was prone to "wandering away and being out exposed at night or any time that she is out." The woman resisted the commitment, and filed a petition for a writ of habeas corpus. The writ was denied by the trial court, but on appeal, the United States Court of Appeals for the District of Columbia Circuit reversed (*Lake v. Cameron,* 364 F. 2d 657, 1966). The appellate court noted that the new hospitalization law (the Ervin Act, see page 00) directs the court, upon a finding that the person is mentally ill and likely to injure himself or others by reason thereof, to "order his hospitalization . . . or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public." It then declared:

> Habeas corpus challenges not only the fact of confinement but also the place of confinement . . . Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for

> their protection . . . It does not appear from [the psychiatrist's] testimony that appellant's illness required the complete deprivation of liberty that results from commitment to Saint Elizabeths as a person of "unsound mind."
>
> Appellant may not be required to carry the burden of showing the availability of alternatives . . . [She] does not know and lacks the means to ascertain what alternatives, if any, are available, but the Government knows or has the means of knowing and should therefore assist the court in acquiring such information . . .
>
> We express no opinion on questions that would arise if on remand the court should find no available alternative to confinement in Saint Elizabeths.

The lower court, hearing the case again (H.C. 439–62, April 17, 1967) in light of the new interpretation of the District's hospitalization law, reached the same result as before. Noting its perplexity at the direction to consult the Department of Public Health, Department of Welfare, the Metropolitan Police Department, the local Mental Health Association, and other organizations and programs to determine whether an alternative to hospitalization existed; and its uncertainty about the implications of such a departure from the traditional "commitment" routine, the lower court complained:

> The statute says the Court may "order any other alternative course of treatment." This raises the question of whether or not the Court may legally commit a patient to a facility or institution other than St. Elizabeths . . . If the Court were to order a patient directly to a foster home or to a private nursing home, who would replace St. Elizabeths as the responsible party? It may be that the Court has the authority to order the patient into another facility and still place the responsibility on St. Elizabeths, but this point is not clear.

It then deftly avoided having to resolve these troublesome questions by finding "that it is quite clear that constant supervision is not only proper but required for the safety of this patient," and that such care is available only at the mental hospital—St. Elizabeths (both opinions are included in Allen, Ferster and Rubin, 1968). The case is a good illustration of the obvious fact that more is needed to effect reform of existing practices and institutions than merely "passing a law."

Financial and Medical Assistance

Relief and welfare assistance to the aged usually represents a significant part of a community's welfare budget. Often, that aid is given grudgingly and insultingly. Harrington described the operation of an all-too-typical office in one State, staffed by persons who were either themselves hostile to the applicants or who were administering laws whose primary function was to "keep free-loaders off the public rolls." They had achieved an impressive rejection rate—assisted by the State's rigorous residency requirement—by a number of devices, including requiring strict proof of age and eligibility. He observes that even in communities and offices where quite a different philosophy prevails, the end result may well be the same because of limitations on the funds. (1963)

Medicare and Medicaid will help to relieve *some* of the elderly of *some* of the financial burdens of physical and mental illness, but it is only a beginning. On a recent edition of CBS's televised news commentary *Sixty Minutes,* Wilbur Cohen, former Secretary of Health, Education, and Welfare, observed that two million people could be taken off of welfare immediately—just by improving the Social Security laws.

Many other areas of need of the elderly might be discussed, but most of them—including their legal aspects—are ably and extensively considered in the report of a National Council on the Aging project, directed by Mrs. Virginia Lehmann, a lawyer, who has since become associated with the Institute of Law, Psychiatry and Criminology (Lehmann and Mathiasen, 1963). In 1971, a new White House Conference on Aging will be convened, under authority of Public Law 90–526, enacted Sept. 28, 1968. Its purpose will be to develop recommendations and plans for action with the following objectives:

1. assuring middle-aged and older persons equal opportunity with others to engage in gainful employment which they are capable of performing;
2. enabling retired persons to enjoy incomes sufficient for health and for participation in family and community life as self-respecting citizens;
3. providing housing suited to the needs of older persons and at prices they can afford to pay;
4. assisting middle-aged and older persons to make the preparation, develop skills and interests, and find social contacts which

will make the gift of added years of life a period of reward and satisfaction;

5. stepping up research designed to relieve old age of its burdens of sickness, mental breakdown, and social ostracism;
6. evaluating progress made since the last White House Conference on Aging, and examining the changes which the next decade will bring in the character of the problems confronting older persons.

It is altogether appropriate that there should be this quality of national interest in our senior citizens. Beverly Diamond underscored that emphasis in her opening remarks at the 1963 Seminar on Protective Services for Older People convened by the National Council on the Aging:

> The ultimate measurement of the quality of our civilization is the way in which the rights and dignity of the impaired individual are protected . . . No single group . . . more poignantly challenges our moral convictions and social values about the worth of human life and dignity and rights . . . than do those older people whose mental and physical impairments place them at the mercy of society. (Quoted in Hall, 1966)

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The Socially and Economically Disadvantaged

Minority Ethnic Groups

> This is our basic conclusion: Our Nation is moving toward two societies, one black, one white—separate and unequal.

These words of the Kerner Commission (1968) have been quoted so often they have begun to lose their impact. Everybody knows what the Kerner Commission said—so, what else is new? With similar bored familiarity, the officers of the Titanic may well have received the reported sightings of icebergs along their course.

The Civil Rights Acts and *Brown v. the Board of Education* have relieved—where they are effective—a few of the grosser kinds of discrimination. But in many parts of the country (and, of course, in Mrs. Murphy's famous boardinghouse) they are not effective at all. And even if they were, they would have barely scratched the surface of the problem.

In his monograph, "The Negro and the Urban Crisis," in the Brookings Institution's *Agenda for the Nation* (1968), Kenneth Clark observed:

> The problem of the northern Negro . . . must be understood not in terms of laws which reinforce segregated education and housing, or discriminatory employment practices, but in terms of a pervasive pattern of racism. The fact of the ghetto—the involuntary restriction of the masses of Negroes to a particular geographic area of the city—underlies every other aspect of the problem. The ghetto results in de facto school segregation, which affects middle- and low-income Negroes alike, and the inferiority in education that is invariably related to it. Inferior education, in turn, reinforces the overriding economic fact of disproportionate Negro unemployment and underemployment.

Clark believes that the division of the total community into black inner city and white suburbs must be ended if the needs of both groups are to be met. This may be a hard proposition to sell to black militants, whose feelings of pride and self-worth now seem to be expressed in separatism. Art Buchwald in a recent column in the *Washington Post* (March 13, 1969) recounts a "conversation" between such a black and a member of the Ku Klux Klan:

> The Supreme Court has no right to tell us to mix with honkies.
>
> They certainly don't. You should be segregated if that's what you want . . . Do you know our organization advocates black and white washrooms in railroad stations and bus terminals . . . Why, up until a few years ago we insisted on separate education for the races—blacks in black schools, whites in white schools.
>
> Man, that's what my demonstration's all about.
>
> And, listen to this. We felt so strongly about the black man living in his own black neighborhood that when some Uncle Tom moved into a white neighborhood, we burned a cross on his lawn.
>
> Good for you . . . Black people who want to move in white neighborhoods are nothing more than plantation slaves.
>
> I've never said this to a black man before, but I like the way you think.
>
> Thanks, honkie. You know I usually won't talk to a white man. But you're different. You're working for the same things we're working for.

The black man in the ghetto regards the police as a brutal, repressive, occupation force, interested not in protecting members of the black community, but in protecting the rest of society *from* it. The Kerner Commission reported:

> Negroes firmly believe that police brutality and harrassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police. (1968).

The Negroes do not feel that the institutions of a white-dominated society exist to safeguard *their* rights; they believe—and not without cause—that the white man's law is a tool of oppression which must be opposed or evaded, rather than employed, to gain freedom. It is a lesson we have taught them—all of us—through our indifference for so many years to the patent inequalities they have had to endure in every aspect of life; our indifference to the fact that our prided "land of the free" had acquired a qualifying phrase: "if you are white." In the course of his campaign, President Nixon declared his support for "black ownership, black pride, black opportunity and, yes, black power." (*New York Times,* April 26, 1968). Each of these phrases must become a reality before it can truly be said that there is equal justice in this country.

Nor is it, of course, only blacks who suffer deprivations of right because of their ethnic identification. The gravest injustice in our history was that committed against Japanese-Americans after Pearl Harbor; and our persistent repression of American Indians is an affront to our national conscience (e.g., see the article by Daniel Henninger and Nancy Esposito, entitled "Regimented Non-Education: Indian Schools," in the March 1, 1969 issue of *New Republic*). The author recently attended a meeting of the Professional Advisory Council of the National Association for Mental Health, where a colleague described the "mental health" outlook of a few years ago:

> Our clinic used to take little Puerto Rican ladies who couldn't pay their rent. After examination, we would recommend them for insight therapy. Then, when that didn't work out because they spoke Spanish and the analyst only English, we would mark the file "insufficient motivation."

But it is the blacks who have forcibly, and justly, compelled us to face ourselves—and them. And Michael Harrington's words

(1963) are being proved prophetic:

> . . . this wall of prejudice will be breached only when it is understood that the problem of race is not just a matter of legal and political equality. It is important that the right to the vote be won in the South, that discriminatory legislation be struck down, and so on. But that is only the beginning. The real emancipation of the Negro waits upon a massive assault upon the entire culture of poverty in American society; upon slums, inferior education, inadequate medical care, and all the rest. These things are as much a part of being a Negro as the color of a man's skin.

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The Offender

> I suspect that all the crimes committed by all the jailed criminals do not equal in total social damage that of the crimes committed against them. (Menninger, 1968)

Hearings currently going on before a subcommittee of the Senate Judiciary Committee have provided daily evidence of the process of dehumanization that characterizes most of our prisons. On one day, for example (March 4, 1969), Thomas O. Murton, former superintendent of the Arkansas State prison system, testified that that system, when he entered it two years ago, was rife with "retribution, exploitation, corruption, sadism and brutality." He termed most prisons "monster-producing factories. . . When we treat men like wild animals, we turn them into wild animals." Murton was dismissed from his position shortly after he found and unearthed the bodies of a number of inmates he said had been murdered by prison officials in the past.

Then Alexandria attorney Philip J. Hirschkop testified about the brutalizing conditions in Virginia prisons. One member of the subcommittee denounced him for "besmirching the great State of Virginia," and accused him of wishing only to "make a sensational statement for the purposes of publicity." Hirschkop replied that the same conditions exist in the penal system of the Senator's own State. (*Washington Post,* March 5, 1969)

The day before Murton and Hirschkop testified, the subcommittee heard from a prisoner in the District of Columbia jail awaiting trial on a charge of armed robbery. The subcommittee chairman asked him: "If you are convicted and get another 10-year sentence, what will you do when you get out?" The prisoner replied: "Man, get me a gun and hold up anything that moves. When you black and an ex-con you got three strikes on you." The chairman continued: "And if you learn a trade?" "Hell, Senator," the prisoner responded, "anybody says you can learn a trade and make a living in D.C. is a damn liar!"

A month before the hearings, another inmate of District of Columbia correctional institutions spoke. Robert A. Woodward—a first-timer, convicted of violation of the District's marijuana law—served 30 days, 19 at D.C. jail and then 11 days at Lorton Reformatory. He is young and slender, sensitive, an artist and poet; he was fair game for the "studs" of Lorton: "I was afraid of taking a shower for fear of being raped." Once he received a note saying, "I want to make love to you in the shower at 12 o'clock. If you're not there, I'll kill you." After being mauled repeatedly by other prisoners, he was finally placed in solitary confinement for his own protection. Malcolm Braly's book *On the Yard,* published in 1967 revealed similar conditions. The stories of overcrowding, of brutality, of the inhumanity of bureaucracy, of the dehumanization of prison life, of homosexual rapes, of lack of meaningful rehabilitation are as old as most of our prisons, and that is very old indeed.

The author wrote a few years ago:

> If your state is like mine, you will find a single institution for housing adult male offenders: a grim, fortress-like building, nearly 100 years old, surrounded by a 12-foot thick concrete wall, topped with barbed wire and broken glass, and patroled by uniformed guards carrying riot guns. Inside the wall, you will see men—half again as many as the prison was originally designed for—marching in lock-step or aimlessly wandering in the prison yard. You are not likely to find leg-irons or a whipping post—few prisons today sanction the grosser kinds of brutality—and the prison officials will proudly point to the first-run movies shown once or twice a week,

> the baseball diamond and gym, the chapel, craft shop and library—products of the reforms of the thirties. Unfortunately, this is about as far as the reforms got, and if you scratch the surface, you will find that because of insufficiency of work opportunities and inadequacy of the educational programs, most of the inmates are forced to spend their terms in undirected, unproductive, non-educative idleness. You will perhaps also find a classification system without trained personnel; a medical care program that does not include a single psychologist or psychiatrist—even on a part-time basis—let alone a working program of psychiatric evaluation and treatment; and a woefully underpaid, undertrained and over-worked staff of guards . . . Over-all, our treatment of prisoners presents a pretty dismal picture. For first offenders, as Judge Irving Ben Cooper, former Chief Justice of the Court of Special Sessions in New York City (and now a Federal judge) observed, it makes about as much sense as putting a child with a head cold into a smallpox ward for treatment. (Allen, 1962)

If he were to write that passage again, the only change the author would make, in light of the current Senate Hearings, would be to express a little less assurance that most prisons have been able to do away with the "grosser kinds of brutality."

But what of legal rights? The United States Supreme Court declared some twenty years ago, that:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. (*Price v. Johnston,* 335 U.S. 266, 285, 1948)

Yet there have been a number of recent decisions—especially by the Federal courts—protecting the rights of inmates of correctional institutions against arbitary or capricious intrusion by prison officials.

A United States District Court in California (*Jordan v. Fitzharris,* 257 F. Supp. 674, 1966) and the United States Court of Appeals for the Second Circuit (*Wright v. McMann,* 387 F. 2d 519, 1967) have acted against the use of "strip cells" as punishment. The latter court observed:

> The subhuman conditions alleged . . . at Dannemora

> could only serve to destroy completely the spirit and undermine the sanity of the prisoner. (e.c. 526)

An Arkansas Federal District Court injoined use of the strap to discipline prisoners (*Tally v. Stephens,* D.C. E.D. Ark., 247 F. Supp 683, 1965), but has refused to find its use *per se* a violation of the Eighth Amendment's prohibition against cruel and unusual punishment (*Jackson v. Bishop,* 268 F. Supp. 804, 1967). Other courts have similarly acted against unjust imposition of punishment, such as discriminatory transfer from the regular prison population to maximum segregation and solitary confinement (*Howard v. Smyth,* C.A.–4, 365 F. 2d 428, 1966; *Landman v. Peyton,* C.A.—4, 370 F. 2d 435, 1966); and even forfeiture of a prisoner's "good time" (*Jackson v. Goodwin,* C.A.—5, 400 F. 2d 529, 1968).

Punishment for religious expression was forbidden by the Court of Appeals of New York (*Pierce v. La Vallee,* 319 F. 2d 844), and by the Fourth Circuit Court of Appeals *Howard v. Smyth,* supra). And the United States Supreme Court has recently ruled that racial segregation in prisons is a denial of equal protection of the law (*Lee v. Washington,* 390 U.S. 333, 1968).

There would seem to be something of a movement toward the "normalization principle" in an annunciation by the Sixth Circuit a quarter of a century ago:

> A prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law. (*Coffin v. Reichard,* 143, F. 2d 443, 445, 1944).

However, it is true, as pointed out by the President's Crime Commission (1967), that "The law has yet to define limits and standards in this area." The Commission recommended that:

> Correctional agencies should develop explicit standards and administrative procedures to enable those under correctional control to test the fairness of key decisions affecting them. These procedures should include gathering and recording facts and providing for independent monitoring and review of the actions of correctional staff.

Expenditures for corrections in the United States are in excess of a billion dollars a year. (Task Force, 1967) Most of that expenditure goes for custodial care, not for rehabilitation. And the incidents of that custody seem more directed to the production of criminals than to their reform. A part of the problem, as recently pointed out by the Associate Director of the Joint Commission on Correctional Manpower Training, is that "very little research is being done in corrections; and . . . there is little agreement on what correctional rehabilitation actually is."

One of the dimensions of true rehabilitation, almost totally ignored by our correctional systems, is after care. In fact, we seem almost deliberately to have done everything possible to ensure that the offender will be unable to rejoin "straight" society. Few of our prisons prepare him to hold a job, or help him to get one; and when he leaves the prison he may well find it impossible to do other than the Washington prisoner, who, on his release, plans to ". . . get me a gun and hold up anything that moves."

It is probably not possible at this time to articulate a "right" to rehabilitation. Society may choose to spend its money as it likes. It apparently prefers to spend it—more or less willingly—on preserving the traditional institutions of the county and city jail and the State penitentiary; and to lose it—quite unwillingly—as a part of the mounting cost of crime; crime that is committed still, for the most part, by persons whom society failed to rehabilitate the first time around.

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The Poor

James Tobin, in his monograph for the Brookings Institution's *Agenda for the Nation* (1968), notes that by the Federal Government's income criteria, there were in 1967 about 26 million "poor," some 13 million less than in 1959. Michael Harrington, five years earlier, said that there were between 40 and 50 million inhabitants of that "Other America" of which he wrote, but admitted that his sense of outrage may have caused him to err on the high side in his estimates. But figures in the tens of millions all sound pretty much alike. Crying children, their bellies swollen with malnutrition, must sound pretty much alike too. It is a sound most of us have never heard, and, God willing, will never hear. But how incredible it is that such sounds should be heard at all, in America, in the last third of the twentieth century.

And who are the poor? They include the families of black southern sharecroppers who came north expecting to find the promised land. Claude Brown described that pilgrimage:

> Going to New York was good-bye to the cotton fields, good-bye to "Massa Charlie," good-bye to the chain gang, and, most of all, good-bye to those sunup-to-sundown working hours. One no longer had to wait to get to heaven to lay his burden down; burdens could be laid down in New York . . .
>
> They felt as the Pilgrims must have felt when they were coming to America. But these decendants of Ham must have been twice as happy as the Pilgrims, because they had been catching twice the hell. Even while planning the trip, they sang spirituals as "Jesus Take My Hand" and "I'm On My Way" . . .
>
> It seems that Cousin Willie, in his lying haste, had neglected to tell the folks down home about one of the most important aspects of the promised land: it was a slum ghetto . . . too many people full of hate and bitterness crowded into a dirty, stinky, uncared-for closet-size section of a great city . . .
>
> But where does one run to when he's already in the promised land? (Foreword to **Manchild in the Promised Land,* 1965)

The poor include members of other minority ethnic groups who have yet to enjoy the fruits of living in the "land of opportunity": Puerto Rican and other Spanish speaking Americans, citizens of oriental extraction, and, perhaps most of all, the American Indian. There are also the residents of Appalachia and other economic disaster areas, and unskilled workers everywhere. Perhaps the most disadvantaged of this latter group are the migrant farm workers, termed "The People Left Behind" by the National Advisory Commission on Rural Poverty (1967), whose housing, health care, educational, wage, employment protection, legal aid and other needs have been for so long ignored (Subcommittee, 1968).

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The ills of the poor are legion. The Citizen's Board of Inquiry into Hunger and Malnutrition in the United States reported (1968):

> If you will go look, you will find America a shocking place. No other western country permits such a large proportion of its people to endure the lives we press on our poor. To make four-fifths of a nation more affluent than any people in history, we have degraded one-fifth mercilessly.

Congressman Charles E. Goodell summarized the findings of this body:

> First. There is a shocking absence of knowledge in this country about the extent and severity of hunger and malnutrition.
>
> Second. Federal food programs fail to reach a significant proportion of the poor, and many of those aided are not helped in any substantial degree.
>
> Third. Millions of Americans suffer hunger and malnutrition and these conditions are increasing both in degree and numbers annually.
>
> Fourth. Hunger and malnutrition here as elsewhere in the world, take their toll in infant deaths, organic brain damage, retarded growth, and impaired ability to learn. (*Congressional Record*, E 3153, April 22, 1968).

The Preamble to Public Law 88–525, the Food Stamp Act of 1964, declared it to be Congress' policy in enacting the legislation, ". . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households." It is now clear that, because of inadequate distribution methods and the requirement of payment for the stamps, many of the poorest who are most in need of food have been unable to obtain it under Federal programs. Changes in those programs are now under way (*Time*, Feb. 28, 1969, p. 25), but for many they will have come too late.

Mental Effects of Poverty

Too late, because some of the by-products of poverty, and of chronic malnutrition, are irreversible. The President's Committee on Mental Retardation notes, in its 1968 Report: that three-fourths of the retarded may be found in slums; that the incidence of mental retardation in inner city neighborhoods *begins* at two and a half times the national average; that a child in a low income rural or urban family is 15 times more likely to be diagnosed as retarded than a child from a family of higher income; that 45 percent of all women who have babies in public hospitals have received no prenatal care; that the proportion of neurological and physical disorders of infants—as well as infant mortality—is many times higher among such mothers; that a high proportion of the children of low income families are found functionally retarded in language and experience when they first come to school, and "an appalling number of these children *fall further behind* with the passing of each school year;" that inner city school children are from 6 months to 3 years behind the national norm of achievement for their age and grade; and that the rate of "intelligence" rejections by Selective Service is three times as high among draftees from low income areas. Among its findings is the unequivocal declaration that: "*The conditions of life in poverty—whether in an urban ghetto, the hollows of Appalachia, a prairie shacktown or on an Indian reservation—cause and nurture mental retardation.*" (italics by the Committee). Serious mental illness and crime are also much more common among the economically and culturally impoverished than among the total population. There is the most compelling evidence that poverty is among the principal causes of these national blights.

Educational and Housing Needs

The under-education of the disadvantaged child is in part the result of woefully inadequate educational facilities in many urban and rural communities, and in part results from cultural impoverishment in the home. The Federal Elementary and Secondary Education Act of 1965 and the Higher Education Amendments of 1968 are beginning to make a difference in meeting the former problem, and Project Head Start has more than proved its importance in dealing with the latter. But the need is much greater in size than any plans yet devised to meet it.

According to 1960 census statistics, 8 percent of whites and 25 percent of nonwhites live in substandard housing. The Kerner Commission reported that preliminary census data suggest that by 1966 these figures had dropped to 5 and 16 percent respectively, but notes that if deteriorating housing, and units with serious housing code violations are added, the percentage of nonwhites living in inadequate quarters is greatly increased. The Commission also notes that in some inner city areas the housing situation is in near chaos. In Newark, New Jersey, for example, prior to the 1967 riot, in three areas containing 30 percent of the total population of Newark and 62 percent of its blacks, the percentages of all housing units classified as either "dilapidated" or "deteriorating" were 43 percent, 64 percent and, in the area containing the highest percentage of nonwhites, 91 percent. In reference to nationwide needs, the Commission recommended provision of 600,000 low and moderate-income housing units in 1969, and of 6 million units over the next five years (1968). The Housing and Urban Development Act of 1968 set as a national goal overcoming the housing problem in a decade by constructing or rehabilitating 26 million housing units, including 6 million for low and moderate income families. We are not—and at the current level of effort (Downs, 1968)—cannot meet this goal.

Unemployment

The Bureau of Labor Statistics reported that the unemployment rate in January, 1969, seasonally adjusted, was 3.3 percent, the same rate as in December, which had been the lowest in 15 years. There were in January, 75.4 million persons employed. There were also 2.9 million unemployed—a "hard-core" unemployed group which has remained relatively constant since the start of the '60s (Nixon, 1968). The Job Corps has been toiling in this vineyard—with at best mixed results. So also have voluntary groups, such as JOBS. Now, the Vocational Rehabilitation Amendments of 1968 have brought the disadvantaged within the scope of concern of the Nation's rehabilitation programs. As Russel Nixon of Columbia University has observed, assignment to Social and Rehabilitation Service of responsibility for administering this law is "both a compliment and a tough challenge."

Law Enforcement

A number of recent studies have shown that law enforcement in urban ghetto areas is far from adequate. Residents—especially blacks—feel that they do not receive sufficient protection, indeed that often their requests for police assistance are ignored. They believe that there is widespread police brutality practiced against them, and that they have no recourse against it. The Kerner Commission cited these beliefs as major contributing causes of urban riots. It pointed out that inadequate police protection may result more from lack of police personnel to patrol ghetto areas than from the racist attitudes of some policemen. Whatever the facts may be about police misconduct, the telling point is that in none of the cities where rioting took place were there adequate complaint review procedures, offering assurance to slum residents that there would be a fair and unbiased investigation of charges brought against policemen, with disciplinary action and prosecution where appropriate (Kerner, 1968).

Exploitation

There are merchants who cheat the poor because they are so pathetically easy to cheat, or who exploit them because there has been no one to complain. There are many techniques: raising the prices of essential commodities when welfare checks are due; use of "bait" advertising, deceptive guarantees, and selling "reconditioned" articles as new; misrepresenting or failing to disclose credit or finance charges or other terms of the sale; and many others. Among the most profitable is simply overselling: convincing the ghetto resident, by a variety of hard-sell, near-fraudulent devices (in which the effective salesman becomes highly expert) that he has to own a 24-volume encyclopedia if his children are to have any chance at all of continuing in school. The author knows of a company which promotes its children's encyclopedia in just this way. Salesmen learn a "pitch" which subtly implies (but doesn't quite say) that the seller is really representing the local school board, which has concluded that purchase of the books is about the only way to save little Johnny's academic career. The

company has found that its "choicest" sales locations are the worst, the most blighted slum areas in town. These are the territories which the "best" salesmen fight to have assigned to them. There are laws prohibiting such practices in every State. They should be strengthened, and they should be enforced as should also Section 5 of the Federal Trade Commission Act (*Congressional Record,* Jan. 22, 1969, p. E370).

The most virulent symptom of poverty—and the one most difficult to deal with—is despair. As Harrington points out (1962), today's poverty ". . . is constructed so as to destroy aspiration; it is a system . . . impervious to hope."

Anatole France once referred to: ". . . the majestic equality of the laws which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." It is unhappily true, that the laws—and until recently the lawyers as well—were made to serve the affluent. Tobin (1968) points out that the $600 dependency exemption in our tax laws is worth $420 to a taxpayer rich enough to be taxed at 70 percent; $84 to a taxpayer taxed in the lowest bracket; and nothing to a family too poor to pay income tax. A wife and mother, deserted by her husband, may be unable to get a divorce—even with the aid of a free Neighborhood Services lawyer—because of the legal fees involved (*Washington Post,* Feb. 22, 1969, p. Bl). Statutes governing bail, the offense of vagrancy, landlord-tenant relations, installment purchases, etc. grossly discriminate against the poor; and the unavailability, until a very short time ago, of legal representation for the poor man insured that these laws and discriminatory practices would never be tested. The situation is far from perfect today, but, as will be discussed in a subsequent section, progress has been made.

Welfare Problems

Welfare is very big business. In New York City, for example, in 1968, welfare comprised nearly a quarter of the total city budget. It is estimated that soon one million New Yorkers—one in every eight—will be on welfare (Nixon, 1968). The welfare program has been largely a failure for a variety of reasons. Tobin (1968) lists some very basic ones: *inadequate covering* (categorical assistance programs often exclude the very people who most need their benefits; *anti-family incentives* (the family that stays together may also pray together, but it may not get welfare); *inadequacy of benefits* (Mitchell Ginsberg, head of New York City's Welfare Department testified before the Kerner Commission, 1968, that: "The welfare system is designed to save money instead of people and tragically ends up doing neither."); *incentives for uneconomic migration* (the greater liberality of benefits and benefit eligibility of some northern cities encourages migration to them thus augmenting their problems); *disincentives to work and thrift* (often earnings the welfare family make are deducted from welfare benefits); *inequities* (of almost infinite variety), and *excessive surveillance* (which is not only demeaning, but uneconomic for the governmental unit requiring it). This latter may infringe upon the legal rights of welfare recipients in a variety of ways, several of which will be considered in the section to follow. But perhaps most important is the relatively low priority which we as a Nation have assigned to dealing with the problem of poverty. Recently in his column in *New Republic* magazine, "TRB" notes that we spend as much in this country for chewing gum as for model cities, for hair dye as for grants to urban mass transport, for tobacco as for higher education; and that we spend more money per year on pet food than on the food stamp program for the poor. (March 22, 1969). We have never really had a "war on poverty"—only a minor skirmish.

The Kerner Commission (1968) reported that ". . . our present system of public assistance contributes materially to the tensions and social disorganization that have led to civil disorders." A report (1969) just released by the Urban Coalition and Urban America, Inc., two private nonprofit organizations, analyzing what has happened since the Kerner Report was issued, finds that there has not yet been ". . . even a serious start toward the changes in national priorities" recommended by the Commission. Senator Fred R. Harris, a member of the Commission, has said recently that the time for study has gone: "To 'tell it like it is' is not enough; we must 'make it like it should be.' America is rich and growing richer. If it gets its priorities straight—if it decides what *is* important—America can do whatever it really wants to do." (*Look*, March 18, 1969).

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Legal Rights of the Disabled and Disadvantaged

An Overview

Law is—or should be—a device for serving basic human needs. And it is never static. When a lawyer says: "This is the law," he is really saying: "This is what I think some court (or *this* court) would do if presented with this question in the future." Thus, the practice of law, like the practice of astrology (which seems to have come once again into vogue), embodies the art of prediction; and, like astrology, that prediction must be based on the perambulations of shifting—albeit not supernal—forces. In what is to follow it is the author's hope that when he says: "This is the law," the saying of it will help a little to make it so.

With that by way of introduction, a very basic question will now be posed; one which seems to underly much of what has been, and will be, said here: Do the disabled and disadvantaged have a right—a legally enforceable right—to demand of society that it assist them to become whole? Is there a "right" to welfare, to treatment, to rehabilitation, to vocational training, or to whatever else might help to remove the disadvantage or ameliorate the disability?

It is over that question that many of the verbal battles (including some of the "legal" ones) have been fought. For example, when complaint is made that welfare questionnaires and interviews, "loyalty" oaths, and periodic investigations of eligibility, infringe upon the recipient's privacy, or upon his freedom of speech, or of association, or constitute an unreasonable search, the response (perhaps along with some observations about "free loaders" and "chiselers") will probably be that by becoming an applicant for welfare, the person has voluntarily surrendered his privacy and the sanctity of his home; that since welfare is a privilege and not a right, it may be conditioned in whatever way the community thinks best, and anyone who objects to the conditions imposed may avoid them by getting himself off the public dole, but has no *legal* right to complain.

We began this paper with quotations from Professor Reich of the Yale Law School, (1965) and from the Kerner Commission Report (1968). There is little doubt of their views of the matter. The Kerner Commission stated in no uncertain terms its position that: "A recipient should be able to regard assistance as a right and not as an act of charity." And Reich has declared ". . . When individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right." But the views of both Professor Reich and the Kerner Commission have been characterized by some as "extreme;" as extreme perhaps as another oft-quoted document, with its reference to the "unalienability" of certain basic rights, was once regarded. They were lawyers who wrote the Declaration of Independence and they used legal terms. To "alien" something means to transfer or convey it, or to give it away. If a man's right to think and speak and vote and assemble are embraced within the concept of "liberty;" if his home is his property, inviolable, except through warrant based upon probable cause; if his privacy and his dignity as a human being are unassailable concomitants of his right to live and pursue happiness, then they are as well incapable of alienation: by sale, or by deed, or by gift—or by application for welfare benefits or admission to a residential care institution.

It is, in the author's opinion, quite appropriate to talk about the disabled and disadvantaged in terms of "rights." Franklin Roosevelt did—eloquently and explicitly—twenty-five years ago in a State of the Union Message in which he said that this country had evolved an "Economic Bill of Rights" of equal stature to that first great Bill, and that it included:

> The right of every family to a decent home;
> The right to adequate protection from the economic fears of old age, sickness, accident and unemployment;
> The right to a good education . . .
> The right to a useful and remunerative job [with sufficient income] to provide adequate food and clothing and recreation.

And all of this "regardless of station, race or creed." And he told the Congress that "America's own rightful place in the world will depend in large part upon how fully these and similar rights have been carried into practice for our citizens." Four years later, in 1948, the United States and 20 other American Republics, convened at Bogota, Columbia, adopted the American Declaration of the Essential Rights and Duties of Man, affirming that:

> All persons are equal before the law . . . without distinctions as to race, sex, language, creed or any other factor . . .
>
> Every person has the right to establish a family . . . and to receive protection therefore . . .
>
> Every person has the right to the inviolability of his home. . .
>
> Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living . . .
>
> Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

The rights we have been talking about, the rights of the disabled and disadvantaged, spring from basic Constitutional imperatives—for example, the right of one institutionalized for mental illness, or mental retardation, or the disabilities of old age, to control his own property until and unless judicially declared incompetent is not diminished by the fact that he is receiving care in a public institution. Stated or implicit regulations unrelated to the purpose of welfare legislation itself, which serve to deny benefits to persons otherwise within the class for whose benefit the legislation was enacted, or which impose unreasonable burdens upon them, may be struck down.

Another President Roosevelt—a Republican President Roosevelt—once said that: "The object of government is the welfare of its people." A more recent Republican President has declared that welfare:

> . . . should meet the immediate needs of those who cannot help themselves—the poor, the disabled, the aged, and the sick. And it should do this in a way that pre-

> serves the dignity of the individual and the integrity of his family. . .

and he urged that its purpose must be to:

> . . . do more than help a human body survive; it must help a human spirit revive, to take a proud place in the civilization that measures its humanity in terms of every man's dignity. (from a radio speech by Richard M. Nixon, October 28, 1968, excerpted in SRS *Newsletter*, Vol. 1, No. 6, Jan.—Feb., 1969)

Some General Principles

Reference has been made at several points in this paper to the principle of *normalization*. It is important in the context of legal rights, embracing as it does the concept that everyone is entitled to a life as close to the normal as is possible. Thus, he is not to be institutionalized merely to serve someone else's convenience; and he is to be accorded all the rights that any other citizen may enjoy, excepting only such rights as have been taken away lawfully, for good reasons, and under fair and appropriate procedures. *Lake v. Cameron* (see page 58) is an application of that concept, as is also the author's enumeration (1969) of the rights of the retarded to:

1. all the rights of citizenship that he is capable of exercising;
2. such protection, assistance and restriction in exercising those rights as is necessary and appropriate in light of his limitations;
3. humane and appropriate care and treatment—preferably in his own home and community, but if necessary in a residential care institution—with the objective of enabling him to live as fully, as freely, and as self-sufficiently as possible;
4. fundamental fairness—due process of law—in the provision and safeguarding of each of the foregoing.

The last point noted—which may be termed the principle of *fairness*—requires that in decision-making affecting one's life, liberty or vital interests, the elements of due process will be observed, including: the right to notice, to a fair hearing, to representation by counsel, to present evidence and to cross-examine witnesses testifying against one, and to appeal an adverse decision. Nor are these elements requirements only—as they were once thought to be—of criminal cases. The State of Arizona argued recently before the United States Supreme Court that the failure of the Juvenile Court of Gila County to provide notice to Gerald Gault and his parents of the nature of the accusation brought against him; its failure to advise them of their right to counsel; its failure to warn Gerald of his right to remain silent; and its adjudication (ordering Gerald to be confined in the State Industrial School until 21, a period of 6 years, on a charge, which if brought against an adult, could have resulted in no more than 60 days imprisonment), made on the basis of unsworn, hearsay testimony, without right of cross-examination—all should be deemed of no consequence, since juvenile proceedings are "non-criminal" and the court acts as *parens patriae,* for the "welfare of the child." The Court, however, reversed (*In re Gault,* 387 U.S. 1, 1967), citing its earlier declaration (in *Kent v. U.S.,* 383 U.S. 541, 1966):

> There is no place in our system of law for reaching a result of such tremendous consequences without ceremony --without hearing, without effective assistance of counsel, without a statement of reasons . . .
> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

In the author's view, the Court could apply a standard no less rigorous to a proceeding under which one is deprived of his liberty or property on the ground of alleged mental illness, or retardation, or advanced age; or to an administrative determination depriving a family of its only source of income which does not afford them a fair opportunity to oppose the action. (Burris and Fessler, 1967). Thus, although it has not yet been declared to be "the law," the author believes that established legal principles require that in any such case the due process requirements of notice, right to counsel, a fair hearing, and right of appeal are fully applicable.

And finally, there is the principle of *respect for the dignity and worth of the individual.* Again, this principle is closely related to the principles of *normalization* and *fairness* discussed above. Here, however, emphasis is placed upon one's right to be treated as a human being, and not as an animal or a statistic. Thus, commission of a crime does not deprive one of all legal rights—a prisoner, even a felon, has a right that he shall not be punished excessively or cruelly, a right to practice his religion, and a right to reasonable protection from homosexual assault. An inmate of a public institution has a right that he shall not be kept sedated, or unclothed for the convenience of the attendants and a right to reasonable communication and visitation. A welfare recipient has a right that his privacy shall not be invaded by "loyalty" oaths and by intrusive inquiries and investigations bearing no reasonable relationship to a determination of need or to the provision of assistance.

Some Specific Needs

In light of the discussion earlier of specific areas of disability and disadvantage, and of the foregoing general principles, the following are among the needs for legal and related reform.

The Mentally Handicapped

1. Reduce the number of terms employed in statutes to denominate some or all mentally handicapped persons, and eliminate ambiguous, confusing or epithetical terms.

2 Define as precisely and appropriately as can be done the class of persons for whom a particular protective service is intended. Each such definition should be *ad hoc*—for a particular purpose—to minimize the risk that reification of the terms used will cause provision of a particular protective service to result in a status of general incompetency.

3. Require judicial approval for institutionalization of a child where it appears that such care is sought in whole or in part to meet the needs of persons other than the child.

4. Establish clinical services adjunctive to every court which has the power to order institutionalization or guardianship of mentally handicapped persons.

5. Clearly separate institutionalization and incompetency, in law, administrative regulation, and practice. Admission to a service or treatment program for the mentally handicapped should not give rise to a presumption of inability to manage oneself or one's affairs.

6. Multiply and greatly improve community facilities for the mentally handicapped. If this were done, many persons now requiring institutionalization could remain in the community.

7. Improve residential care facilities. There is greater need here for "brains" than for "bricks"; upgrading professional and sub-professional staffs would result in the provision of real treatment and rehabilitation in institutions which are now capable of providing only custodial care.

8. Require periodic re-evaluation, and, where appropriate, retesting and reexamination of all inmates of residential care institutions and establish some form of independent review of such re-evaluation program.

9. Invoke special procedures when an inmate of a residential care institution reaches the age of 21, in order that a guardian be appointed and appropriate family planning made when needed. The New Jersey law may offer a useful model in this regard.

10. Do not require parents and other relatives to bear the cost of institutional care; and do not assess such cost against the institutional resident in such a way as to exhaust his personal funds.

11. Give consideration to providing payment to the parents of a retarded child capable, with special help, of living in the community, to enable them to provide such care and training, thus avoiding the necessity of institutionalization.

12. Provide intensive care facilities—offering real rehabilitative care and not merely imprisonment—for the retardate with problems of behavior.

13. Establish an inexpensive, stigma-free guardianship procedure. (A number of guidelines and model provisions are set out in Allen, Ferster and Weihofen, *Mental Impairment and Legal Incompetency, 1968*).

14. Create a public agency in every state coordinate with, but independent of the agency having control of State institutions and special educational facilities. The new agency should have casework, legal, financial and other resources so that it can assist private guardians, or serve in lieu of a private guardian, for mentally handicapped persons.

15. Delineate the duties of a guardian of the person—perhaps through the joint efforts of local bar associations and associations concerned with the care of the mentally handicapped.

16. Improve court facilities and procedures for supervision of guardians.

17. Appoint a guardian ad litem, who is a lawyer, to represent an alleged mentally handicapped person in any case affecting his

liberty, property or other vital interests, whenever the court is not convinced that he has adequate representation. No such person should be considered adequately represented on the basis that a petitioner (other than himself), or a relative is represented by counsel.

18. Make information about laws affecting the mentally handicapped and their families widely available to parents, legal and medical advisors, and to community and residential care personnel.

19. Provide explicit guidelines with respect to a residential care institution's management and disbursement of patient funds.

20. Reexamine commitment laws with the view of changing those procedures which demean or humiliate the subject of the petition, or which deal with him as though he were a criminal. Consideration should be given to adoption of some of the provisions of newer laws, such as the Ervin Law in the District of Columbia.

21. Abolish compulsory sterilization, under whatever euphemism it may be invoked. (Note: as this paper is being written, two cases are pending before the United States Supreme Court which may well lead to this result).

22. Conduct research into the relationship of mental retardation and criminal behavior, and into the ways in which present criminal law-correctional procedures might be improved. One possibility—worth at least experimental establishment—is the author's suggested Exceptional Offenders Court (Allen, 1966), a suggestion seconded by Brown and Courtless in their report to the President's Crime Commission (1967).

23. Consider legislation recognizing that where one's liberty is taken away on the basis of a determination that he is in need of treatment, treatment must in fact be provided; if it is not, he has a right to demand his release (*Rouse* v. *Cameron*, 373 F. 2d 451, 1967, reprinted in Allen, Ferster and Rubin, 1968; see also Birnbaum, 1960).

Alcoholics and Drug Addicts

1. Criminal sanctions applied to alcoholics for the offense of public drunkenness should be done away with and comprehensive treatment programs, including after care, substituted for them. The United States Supreme Court's decision in *Powell* v. *Texas* by

no means precludes such State action; nor does it preclude State judicial decisions similar to that in the *Easter* case—indeed, according to a newspaper report of the last several days, the Supreme Court of Minnesota has just taken such action, invalidating a public drunkenness conviction.

2. Criminal laws dealing with "narcotics" and "dangerous drugs" should be reexamined. Among other changes which would seem desirable:
   a. penal sanctions applicable to marijuana possession and use should be eliminated or greatly reduced in severity;
   b. the severity of the penalties which may be imposed against narcotic addicts for violation of drug laws should also be diminished.
   c. civil commitment should be made more readily available as an alternative to criminal punishment for drug addicts through enactment of State statutes similar to those in effect in California and New York, and through improving the Federal law by eliminating the categories of criminal offenders presently excluded from the civil commitment provisions of the Narcotic Addict Rehabilitation Act.

3. Research efforts directed toward increasing our knowledge about alcoholism and drug abuse, and about the treatment of alcoholics and drug addicts should be greatly expanded.

The Physically Handicapped

1. Laws prohibiting or restricting basic rights, including the right to marry, to have custody of children, to hold a job, and the like, on the sole ground of being an epileptic, should be repealed.

2. Laws providing for involuntary hospitalization (and any remaining laws permitting involuntary sterilization) on such ground should also be repealed.

3. Consideration should be given in every State to enactment of a drivers' licensure statute similar to those in effect in Wisconsin and Ohio.

4. Legislation similar to PL 90–480 (Elimination of Architectural Barriers to the Physically Handicapped in Certain Federally Financed Buildings) should be enacted in every State. Appropriate guidelines similar to those recommended by the National Commission on Architectural Barriers to Rehabilitation of the Handicapped should become a part of every building code.

5. Workmen's Compensation laws should be changed so that return to gainful employment is not penalized—nor is the employer who hires handicapped workers.

6. The Social Security law should be amended to provide for appointment of a lawyer to represent the claimant who cannot afford to hire one, for both administrative and judicial review of his claim.

7. Consideration should be given to the enactment of a Federal Civil Rights law for the handicapped.

The Aged

1. Perhaps the most pressing need is for the provision of many more and better equipped nursing homes for people of advanced years who require constant nursing care, in order that State mental hospitals need no longer be used as warehouses for the elderly.

2. In addition, community facilities offering casework, housekeeping and budgetary services and the like to elderly people living at home should be augmented.

3. The principle of *Lake* v. *Cameron* should be incorporated into legislation, in order to insure that no elderly person shall be committed to a residential care facility—especially a State mental hospital—without a thorough inquiry into the availability of alternative community-based resources.

4. The Social Security law should be revised to include many more of the nation's senior citizens. Persons who have worked and earned through their lives are entitled to a life of decency and dignity when they are too old to work. They should not be compelled to resort to "charity" in order to live.

Minority Ethnic Groups

1. If blacks, American Indians, Mexican and Puerto Rican-Americans, and other minority groups who have suffered generations of oppression are to be integrated into the fabric of American life before that fabric is irrevocably rent—there must be immediate and heroic action on several fronts. Among other things, it will be necessary:

   a. to provide scholarships, living allowances, reduced entrance requirements, and special tutorial help to permit members of such groups, in much larger numbers than ever before, to enter, and successfully to complete, university training;

b. to break down barriers to apprenticeship programs and employment of skilled workers, and to make vocational training more widely available—which will require the full cooperation of business and labor, as well as government;

c. to enforce anti-segregation guidelines in every school district, by whatever lawful means will get the job done;

d. to provide public housing on a massive scale;

e. to make sure that medical and legal assistance is freely available to all who are in need of them;

f. to establish independent, civilian police complaint review boards in every city in the country;

g. to move against poverty and hunger with all the vigor, and all the resources with which we are presently fighting a war, 10,000 miles removed from where our greatest national need—and our greatest national threat—exists.

The Offender

1. We must spend the money and provide the resources necessary to make our system of corrections rehabilitative, instead of —as they are now—at best custodial, and at worst brutalizing "monster-factories" (as the nation's prisons were recently described in testimony before a Senate committee). We should begin by recognizing that corrections does not begin at the prison door, but with the first contact of the offender with the representatives of society. When law enforcement officials violate the law, or demean or brutalize those with whom they come into contact, or when imprisonment before trial (so-called "preventive detention") is deemed justified by the "crime problem," then there has begun a process of *dehabilitation* that will defeat any later efforts to provide *rehabilitation.* We have much yet to learn about the causes of crime, about criminal typologies, and about what works and what doesn't work to break the cycle of recidivism which characterizes so many offenders. But we are not yet doing a fraction of what we do know how to do; and we are permitting a great many things to go on in our correctional system that we know do not "correct," but rather exacerbate, the crime problem.

The Poor

1. Whatever may be his other legal rights, every citizen of this country should be accorded the right to live: to enjoy at least that

minimal level of nutrition, housing and medical care necessary to sustain life and health. To the extent that there are starving children in this country, or children who, if not starving, are so malnourished that they are unable to develop physically or mentally in normal fashion; to the extent that there are adults who go to bed hungry at night; or families who lack suitable shelter; or areas where medical care is not available—and all of these things exist, right here in the United States—we are permitting the gravest violation of the most sacred right of man in a civilized country.

2. Every child has a right to an education, at least through elementary and secondary public school levels; and every child has the right that the educational facilities provided for him be reasonably comparable to those afforded the children of other communities within the same governmental unit, regardless of the comparative social or financial status of those communities.

3. We must break through the barrier of "hard core" unemployment. There should be recognized a right to earn a decent living—with, if necessary, the Federal Government as the employer of last resort.

4. The citizen has a right to police protection and a right to restrain police abuse. There should be established in every community a civilian police review board.

5. The laws protecting the consumer—both State and Federal—should be strengthened, and more vigorously enforced.

6. Our criminal, tax, domestic relations and commercial laws should be reappraised and reformed in order better to meet the special needs of the poor.

7. Reform and expansion of our present welfare programs is essential, and it is urgent.

Some Suggestions for Implementation

Since this paper has already exceeded in length the author's intention—although, it is hoped, not the reader's patience—but four implementational strategies will be discussed: *representation by counsel; consumer participation in policy formulation; establishment of an "ombudsman" sytem;* and *recognition of the extent and character of the national effort required.*

Representation by Counsel

The "right to counsel" is one of our most cherished, and most important legal rights, and it is a right which has grown tremendously in extent in just the last few years. A quarter of a century ago, the United States Supreme Court ruled that the States are not required to furnish counsel to every indigent defendant charged with a criminal offense. But in 1963 it reversed itself in a case involving an oft-convicted semi-literate charged with breaking and entering a poolroom in Florida, who had sent a handwritten petition to the Court protesting the fact of his conviction without benefit of counsel (*Gideon* v. *Wainwright,* 372 U.S. 335; and see Lewis, 1964). The Supreme Court agreed to hear his case and a prominent attorney was appointed to represent him. When the case went back for retrial, it had a storybook ending. Gideon was really innocent, and the lawyer the Florida court was required to provide him was able to prove it.

Since the *Gideon* case, there have been a number of other opinions, and a few statutes—the Criminal Justice Act of 1964 (18 U.S.C. Sec. 3006A) for one—extending and implementing the right to counsel in State and Federal criminal cases. Progress has been due in part to a report by a committee of the American Bar Association in 1964 which pointed out that most of the jurisdictions of the United States were failing to provide counsel for the indigent, and that some 150,000 persons every year are charged with crimes punishable with imprisonment of a year or more, who cannot afford to hire a lawyer. (Silverstein, 1965, and Attorney General's Committee, 1963). Although in the *Gault* case discussed earlier, the Court extended the right to counsel to a non-criminal area—juvenile court proceedings—it has not as yet been extended, as a matter of right, to the areas of civil litigation which may be of vital concern to the disabled and disadvantaged (landlord-tenant cases, domestic relations matters, workmen's compensation, claims for benefits against governmental agencies, competency and commitment cases, and the like).

However, the American Bar Association resolved more than two decades ago that:

> . . . it is a fundamental duty of the bar to see to it that all persons requiring legal advice be able to attain it, irrespective of their economic status. (Proceedings, 1946)

The ABA's proposed Code of Professional Responsibility (1969) reaffirms the duty of every lawyer to serve the disadvantaged, both individually and through participation in legal aid and other organized programs. There are today legal aid offices in most American cities. Defender projects, neighborhood legal services projects, lawyer referral services, and others, are being financed by the Office of Economic Opportunity, Department of Justice, the Department of Health, Education, and Welfare, State and local Governments, the Ford Foundation, bar associations, law schools and other organizations. Collectively, these programs do not yet meet the total need (in some areas they meet almost none of it—for example, the rural poor), but much more is being done today than has ever been done before. In 1967, for example, more than 1,800 attorneys were engaged in providing legal services to the poor (Kirgis, 1969), and in 1968 the Federal Government alone expended nearly $50 million for this purpose (Harrison, 1969).

Much has been accomplished. Suits have been brought—and defended—successfully on behalf of poor people: against retail sellers of merchandise (*Williams v. Walker-Thomas Furniture Co.*, C.A.-D.C., 1965, 350 F. 2d 445), against landlords (*Edwards v. Habib*, C.A.-D.C., 1968 397 F. 2d 687; *Thorpe v. Housing Authority of the City of Durham*, U.S. Su. Ct., 1969, 393 U.S. 268), and against public agencies (*King v. Smith*, U.S. Su. Ct., 1968, 88 S. Ct. 2128.) More than 1,000 citizens in 26 states have begun a suit against the U.S. Department of Agriculture, seeking to force commodity distribution or food stamp programs in 500 counties which do not offer them. They have received expert assistance from the Columbia University Center for Social Welfare Policy and Law. (*Trial Magazine*, Dec.–Jan., 1969, p. 57). In other cases, state vagrancy statutes have been struck down (Cases cited in ALR 3d 792, 1969).

The foregoing offer but a small perspective of the revolution in American law which has been engendered. In 1967, for example, nearly a third of a million cases were handled—three-fourths of them successfully. And it should be remembered also that the assertion of legal right in a single case may have far-reaching results. Edgar and Jean Cahn have observed:

> The assertion of a right in even a single case can have community-wide ramifications: police may begin to act

> more circumspectly; welfare workers may consult their regulations more regularly; credit companies may be slower to repossess articles or to sell them without affording proper opportunity for payment; and landlords may become prompter in making repairs . . . (1964)

Legal services for the poor should be continued, improved and expanded. Thoughtful suggestions have been made for improvements in method and structure (Cahn, 1967; Kirgis, 1969; Oaks, 1969). Too few of the existing projects presently provide services to some of the groups whose need is greatest, like the mentally ill (*Civil Liberties*, p. 30, Feb., 1969) and prisoners (Note, Wisc. L. Rev., 1967). However, on the whole, the successes of the programs which have been instituted have been among the signal achievements of the "war on poverty."

One of the newer and most promising areas is the establishment of new course work in "poverty law" in law schools (see e.g., *Student Lawyer Journal*, pp. 15 and 16, Feb., 1969). Other recent advances are the widening of opportunities for minority group members to get a legal education; and such programs as that offered by the Urban Law Institute of The George Washington University School of Law, in cooperation with O.E.O.'s VISTA, which is designed to produce what its Director, Professor Jean Camper Cahn, refers to as "house counsel for the poor."

Consumer Involvement

A candidate for high political office recently invoked the "doctor-patient" theory of dealing with the disabled and disadvantaged. It goes something like this: There must be something wrong with folks who can't seem to get and hold good jobs in our affluent society; and where something is wrong with someone, you call in the experts to deal with it. After all, a doctor doesn't share his decision-making about diagnosis and treatment with his patient, does he?

A very different view was taken by the late Dr. Martin Luther King, Jr.; he saw the issue of "consumer involvement" as a matter of simple justice. In his *Letter from Birmingham City Jail* in 1963, he defined an "unjust law," for those who had expressed concern about his and his followers' refusal to comply with the racist statutes and ordinances of Alabama: "An unjust law is a law that a majority inflicts on a minority which that minority had no part in creating or enacting." John Gardner, former Secretary of

Health, Education, and Welfare, shared that view: "Every man should be able to feel that there is a role for him in shaping his local institutions and local community" (Gardner, 1969). And so did the late Senator Robert Kennedy, who continued to urge until his untimely death: "the involvement of the poor in planning and implementing programs: giving them a real voice in their institutions."

Planning *for* instead of *with* the disabled and disadvantaged (the "physician-patient" approach) had characterized most of the programs which preceeded the Economic Opportunity Act of 1964 (Moynihan characterizes some of the privately-sponsored plans as "well-to-do benefactors thinking up a nicer life for the poor." [Moynihan, 1969]). That law first introduced the concept of "community action"—defined as "maximum feasible participation of residents of the areas and members of the groups referred to . . ."

A number of explanations have been offered for the difficulties experienced by the Community Action Programs. Moynihan describes the problems in these terms:

> Over and over again, the attempt by official and quasi-official agencies . . . to organize poor communities led first to the radicalization of the middle-class persons who began the effort; next to a certain amount of stirring among the poor, but accompanied by heightened racial antagonism *on the part of the poor* if they happened to be black; next to retaliation from the larger white community; whereupon it would emerge that the community action agency, which had talked so much, been so much in the headlines, promised so much in the way of change in the fundamentals of things, was powerless . . . Finally, much bitterness all around. *Maximum Feasible Misunderstanding* (1969).

Some of the reviewers of Moynihan's book, however, have pointed to other factors. Frank Mankiewicz, Senator Robert Kennedy's press secretary, and now a columnist for the Los Angeles *Times Syndicate*, observed recently in the *Washington Post* (Feb. 6, 1969) that O.E.O. staffed too quickly, and with too many "civil servants." to whom "the 'feasible' soon became more important than the 'maximum'." And Francis Pierce, in a review in *New Republic*, noted that the difficulties with "maximum feasible participation" came when it was taken by some to mean "that the poor were actually to be allowed to run the show rather than having it run for them by political bosses and welfare bureaucrats."

Moynihan suggests that perhaps the poor are never "ready" to assume power in an advanced society, but he also offers ample proof that, as a result of political problems, funding limitations and other restraining influences, the poor were never allowed to take a full, participatory role in policy-making.

Despite criticisms—seemingly based largely on the fact that the "voice of the poor" is often impatient, raucous and ungrammatical—the General Accounting Office in its appraisal of O.E.O.'s community action program reported many assets. While expressing the view that more might have been achieved in view of the level of spending involved (some $3.5 billion over a five-year period), the investigators from the General Accounting Office declared that the program "has been an effective advocate for the poor in many communities and appears to have gained acceptance in most communities as a mechanism for focussing attention and action on the problems of the poor."

Whatever the problems and shortcomings of giving the disadvantaged a significant role in planning, excluding them is far more hazardous (e.g., the fate of the "Model Precinct" plan in the District of Columbia, *Washington Post,* March 16, 1969, p. B5). Changes should doubtless be made in some—or perhaps all—of the community action programs which have been started under the impetus of O.E.O. How this should be done, and what form the changes should take is quite outside the author's expertise. It is his opinion, however, that whatever is done, the idea of consumer participation in policy decision-making must be retained. However, the importance of and publicity given to participation by the poor through community action must not be allowed to obscure the need for involvement of the blind in the structuring and administration of programs for the blind, of prisoners in programs looking toward their rehabilitation, and the like. Here too, the model of the joint, participative effort must replace the prevailing model of "diagnosis and treatment."

The "Ombudsman"

The office of the "Ombudsman"—or its equivalent—has been established in a number of countries, but is distinctly Nordic in origin dating back to turn-of-the-century Sweden. Although there are variations—related, among other things, to whether the Ombudsman is considered an instrument of the legislative or of the executive branch of government, most Ombudsmen receive complaints about action taken—or not taken—by a governmental agency or official and investigate the complaint. If the Ombudsman finds the complaint meritorious, he takes such action as he deems necessary, including prosecution of officials, where indicated. (Rowat, 1962).

Scholars like Donald Rowat of Canada and Walter Gellhorn of Columbia University Law School have written extensively about the Ombudsman and about possible application of the device to our own systems of law and administrative decision-making (Rowat, 1962, 1964; Gellhorn, 1966). For the disabled and disadvantaged—who are often very much at the mercy of administrative decision-making or inaction—the institution of the Ombudsman has particular appeal. Legal representation still is not always available; nor are lawyer always conversant with the maze of administrative tribunals and officials in whose domains a particular problem (rats in the basement, reduction in welfare benefits, oppressive or intrusive "officialism," and the like) may lie.

Courts will usually review an administrative decision only as to its legal sufficiency—not its wisdom, practicality or reasonableness; and court procedures may be far too slow to meet the urgency of the need. Private groups, such as the American Civil Liberties Union, National Association for the Advancement of Colored People, etc., have performed exceptionally valuable services in "landmark" cases, but they simply do not have the facilities to meet the day-to-day needs of the tens of thousands of disabled and disadvantaged citizens who must contend with the multi-headed monster *Bureaucraticus Carnivora.* Congressmen may provide Ombudsmanlike services to constituents, but the quality of those services varies greatly, depending upon the knowledge of the Congressman about the particular area involved, and his interest in, and time available to serve, the particular constituent. The constituents with whom we are particularly concerned in this paper, are notoriously poor campaign contributors, and have little "influence." And, if they happen to live in the District of Columbia, they have no Congressional Representative upon whom they may call.

In Sweden, Finland and Denmark—which have had the longest experience—Ombudsmen, in most cases, serve simply as information centers (a most useful function indeed!). In only about 15–20 percent of the cases is there found a need for even so much as a reprimand for the agency involved. Rosenthal (1964) believes that the Ombudsman, or "People's Representative" is the most important single factor in the Swedish people's characteristic confidence in and respect for their government.

The Cahns have written about the possibility of establishing the office of Ombudsman at the Federal level (Cahn, 1968); but its most effective use might well be at State, and even local, levels. The idea is worth considering. If the thought of general "ombudsmanship" is alarming, the duties and authority of such an official may be strictly limited: to welfare and housing matters, for example. At least, as suggested earlier that modest, quasi-ombudsman—the civilian police review board—if established in the Nation's cities, would go a long way toward relieving the potentially explosive relationship which presently exists between police and ghetto.

Recognition of the Need

It is hoped that what has been written here has provided ample documentation of the extent of the need of the disabled and disadvantaged. We have reached a point in this country—and very nearly passed it—at which we can no longer defer making a genuine effort to solve the problems of the handicapped and continue to survive as a country.

It is fanciful, for example—and it may well be catastrophic—to think that substantial inroads can be made upon the problems of poverty and racial oppression without *massive* expenditures, and tremendous investments of creative energy. Both James Tobin and James L. Sundquist have recommended establishment of "income assistance" to meet the urgent needs of the urban poor (Brookings, 1968), as did also the Kerner Commission (1968). Whether that assistance should take the form of a "negative income tax", "family allowances" or some other system is beyond this author's competence to judge; but it is as apparent as is the blight of poverty in our Nation that some kind of direct help is needed—and that without further delay.

Yet the ubiquitous "well-informed sources" are beginning to be quoted as doubting that the Nation can afford to continue the Model Cities program; they are offering as the solution to hunger in America a plan for simply shifting the present Food Stamp program from the Department of Agriculture to the Department of Health, Education and Welfare. Cutbacks continue to be made in basic research—especially in research in the social and behavioral sciences (Letter to the Science Editor of the *Saturday Review,* from Senator Fred R. Harris, Nov. 2, 1968).

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Conclusion

One day we may attain such a high order of civilization that it will be regarded as the first duty of government to see to it that no man is denied—or made to suffer abridgement of—his rights to *life*: full, rich, abundant; *liberty*: free, undiminished by loyalty oaths and intrusions into his privacy and human dignity; and the *pursuit of happiness*: unencumbered by racial persecution, or ignorance, or the blight of poverty. In such a civilization there would be general recognition of the right of every handicapped person to such training, rehabilitation, income assistance, legal and medical help, guidance and counseling as may be necessary to enable him to enjoy these basics of life—these "unalienable rights"—to the full of his capacity. Such a civilization would be fully aware that dignity and freedom are as precious to man as is his daily bread, and as necessary, and would provide fair—as well as humane—mechanisms for safeguarding his rights. As Justice Black has observed: "Just as courage is the condition of every other virtue, fair procedure is a condition to every freedom." (*perspectives in Constitutional Law 1963*)

President Nixon has said: "To those who are helpless, welfare has been inadequate." He is right—it *has* been inadequate; and it has also been unfair. The disabled and disadvantaged have been denied the *equal justice under law* which is also *their* birthright as Americans. The concept of equal justice, when applied to the handicapped—the inherently unequal—means all of the things about which we have been talking: normalization, and fair procedures, and respect for human dignity and worth, and participation in decision-making about one's own future.

Is this kind of equality really attainable? One day in late summer, half a dozen years ago, the author stood facing the steps of the Lincoln Memorial and listened to one of the greatest men this, or any other, Nation has produced. He spoke to that question, and his words are as relevant today as they were then—because the problems of which he spoke are still alive, but so also is the hope those words inspired:

> I say to you today, my friends, even though we face the difficulties of today and tomorrow, I have a dream. It is a dream deeply rooted in America.
>
> I have a dream that one day this Nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident that all men are created equal . . ."
>
> With this faith we will be able to hew out of the mountain of despair a stone of hope. With this faith we will be able to transform the jangling discords of our Nation into a symphony of brotherhood . . .

That day will come, that dream of the late Dr. Martin Luther King, Jr. will be realized, if we have the will and the faith to bring it about. No task before us should be assigned a higher national priority.

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